Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.



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| In the Matter of | ) | |
| Digital Performance Right in Sound Recordings Rate Adjustment | ) | Docket No. 2002-1 CARP DSTRA 3<br>2000-2 CARP DTNSRA |

**COMMENTS OF ROYALTY LOGIC, INC.**
**OBJECTING TO PROPOSED TERMS**

Pursuant to the Notice of Proposed Rulemaking in the above-captioned proceeding, published at 68 Fed. Reg. 27506 (May 20, 2003), Royalty Logic, Inc. ("RLI") files hereby its objections to those terms of the proposed regulations that relate to the Designated Agent and certain other administrative terms. RLI raises no objection to the rates agreed to by the parties. Specifically, RLI objects to proposed regulations contained in PART 262 that would have the anti-competitive effect of eliminating the only other agent designated to compete with RIAA/SoundExchange in offering critical statutory royalty collection and distribution services to copyright owners and performers. The regulations would deny to RLI a continuation of its designation pursuant to the previous webcasting CARP and thereby deny to RLI's copyright owner and performer affiliates their right, pursuant to 17 U.S.C §112(e)(2), §114(e)(1-2) and §114(g)(3), to the common agent of their choosing.

RLI filed the appropriate Notice of Intent to participate in the industry-wide voluntary negotiations leading up to the proposed regulations. However, RIAA/SoundExchange has utilized its market power to force the services into exclusive "one agent only" agreements

("characterized" by the RIAA as being voluntary[1]) that eliminate RLI as a competitive Designated Agent. These "one agent only" agreements are intended to deny choice and self-determination to performers and copyright owners who would never, unless forced, elect to be represented by RIAA/SoundExchange. If the Copyright Office does not authorize a CARP for the purpose of fully designating RLI as a "Designated Agent" under these circumstances, then participation in the industry-wide voluntary negotiation process is meaningless.

RLI's alternative proposed regulations are submitted herewith at Appendix A. Also submitted herewith is a Notice of Intent to Participate in any arbitration in this proceeding with respect to designation of, and the terms and regulations applicable to the Designated Agents.

## I. Background of RLI and its Interest in This Proceeding.

RLI is a for-profit corporation with its principal place of business in Burbank, California. RLI was appointed by the Librarian of Congress as one of two Designated Agents for the distribution of royalties paid under the Section 114 statutory license for the digital transmission of sound recordings by Eligible Nonsubscription Services. *Determination of*

[1] RLI believes that the so-called "voluntary" agreements have been made contingent on the services agreeing to RIAA/SoundExchange being the sole Designated Agent. It is, therefore, a gross mis-characterization for these "one agent only" agreements to be called fully voluntary – and, accordingly, the assent of the services paying the royalties should be given little weight. Furthermore, the services have no meaningful economic interest in whether RIAA/SoundExchange is the exclusive or nonexclusive Designated Agent, inasmuch as such designation does not affect the amount of their payments nor the administrative burden of making the payments. On the other hand, the opposition of RLI and its affiliated clients represent compelling interests against the proposed settlement which would make collection of royalties through RIAA/SoundExchange "in-voluntary" and "compulsory" on those copyright owners and performers who have interests, goals, business and cost recoupment strategies that diverge from the RIAA and their member record labels.

*Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule*, 67 Fed. Reg. 45239 (July 8, 2002) (the "Webcaster Decision"); 37 C.F.R. §261.4(b). RLI's business objective is to provide broad "common agent" services, as specifically authorized pursuant to 17 U.S.C §112(e)(2) and§114(e)(1-2) to sound recording copyright owners and performing artists with respect to the administration and distribution of royalty payments to be made to them pursuant to both voluntary and statutory licenses.

In order to provide these services at the lowest cost during the period when the business of digital transmission services is developing, RLI has entered into a long-term database, data processing and systems management agreement with Music Reports, Inc.[2]

RLI currently represents numerous copyright owners and performers whose works and performances have been performed by all statutory licensees including the pre-existing subscription services, satellite digital audio radio services and eligible nonsubscription and subscription webcast services.[3] RLI secures a broad right of representation across all Section 112 and 114 voluntary and statutory licenses such that RLI is authorized to collect and

[2] Since 1989, Music Reports, Inc. has been making a market in music licensing transactions and providing data, systems and management expertise to administer high volume-low dollar music licensing transactions with respect to the public performances and reproductions of musical works on radio, television, cable and satellite broadcasting, and cable and satellite subscription music services. MRI currently administers more than $50 million in music licensing royalties annually, on behalf of record companies, digital distribution services and broadcasters in the U.S.

[3] RLI affiliates include copyright owners of recorded performances by Billboard-charted performers such as Coolio, Bobby Womack, David Was, Ray Charles, Burl Ives, Little Richard, Jimi Hendrix, Patsy Cline, Billie Holiday, Ella Fitzgerald, The Ink Spots, The Mills Brothers, Sarah Vaughn, Ricky Bell, Junior Reed, Black Uhuru, Taj Mahal, Motorhead, Dee Dee Ramone, Maxi Priest, Kurupt, Biohazard, etc.

distribute statutory license royalties and administer voluntary license transactions between individual copyright owners and transmissions services.

By affiliating with RLI and electing to receive their royalties from an agent other than RIAA/SoundExchange, RLI's performer and copyright owner affiliates are expressing their opposition, through RLI, to the proposed settlement, and are affirmatively exercising their right under 17 U.S.C. §114(g)(3), across all statutory licenses, to prevent a diminution of their royalties as a result of recoupment of unauthorized costs by RIAA/SoundExchange. Congress clearly expressed its intent by providing, in Section 114(g)(3), an exemption from RIAA cost recoupment such that copyright owners and performers choosing "another Designated Agent" would not be required to shoulder RIAA/SoundExchange's litigation costs and expenses against their will.[4] But copyright owners and performers can opt out of those confiscatory burdens only if the regulations designate an alternative agent to SoundExchange. Thus, the proposed "one agent only" regulations are in direct conflict with the "two agent" intent of Congress. RLI respectfully submits that approval of the proposed settlement would thwart the intent of Congress and the rights and interests of copyright owners and performers.

Copyright Owners and Performers who are party to the proposed settlement (i.e., those represented by RIAA/SoundExchange, The American Federation of Musicians and The American Federation of Television and Radio Artists) do not represent the will of all copyright owners and performers entitled to receive royalties. RLI must be designated to

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[4] New Section 114(g)(3) provides: A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto **other than copyright owners and performers who have elected to receive royalties from**

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collect and distribute all statutory royalties, otherwise, the statutory rights of RLI-affiliated copyright owners and performers will be eviscerated by the settlement proposed by RIAA/SoundExchange.

Moreover, if the Copyright Office permits RIAA/SoundExchange, through private agreement, to negate the statutory rights of copyright owners and performers who do not wish to affiliate with RIAA/SoundExchange for the distribution of their performance royalties, then nothing will stop RIAA/SoundExchange from insisting on the elimination of RLI as a Designated Agent in every future settlement of a CARP proceeding. As a result, RLI copyright owners and performers would be compelled against their will to subsidize activities of RIAA/SoundExchange that they never had an opportunity to approve or influence and with which they may substantively disagree, and which subsidies could consume substantial portions of their performance royalties due to the imposition of historical litigation and other costs that RIAA/SoundExchange is seeking to impose on RLI affiliates.

In prior proceedings, the Copyright Office defined what it means to be an "interested party" for purposes of participating in a CARP proceeding. Having an interest in a CARP proceeding "suggests that a participant must be a party directly affected by the royalty fee, e.g., as a copyright owner, a copyright user, or an entity or organization involved in the collection and distribution of royalties." Order, *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Dkt. No. 99-6 CARP DTRA (June 21, 2000).

Thus, in light of the prior decisions of the Copyright Office and as an entity that distributes royalties, RLI has a stake in the proceeding and meets the definition of an

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**another Designated Agent and have notified such nonprofit agent in writing of such**
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"interested party" for purposes of this proceeding. Moreover, RLI is objecting to proposed terms, which would have the significant effect of eliminating RLI as a Designated Agent. Therefore, contrary to previous assertions of the RIAA, RLI is an interested party with much more than a *de minimus* interest.

**II. The Small Webcaster Settlement Act of 2002 ("SWSA") supercedes the regulatory requirement of "prior designation" by CARP or voluntary agreement contained in 37 C.F.R. §201.37(b)(1). Therefore, RLI may provide full common agent services to copyright owners and performers and may collect statutory license fees directly from licensees in connection with all statutory licenses.**

Sections 112(e)(2)[5] and 114(e)(1-2)[6] of the U.S. Copyright Law give copyright owners the right to designate common agents for the purpose of administering both voluntary and statutory licensing transactions - without limitation or any requirement of prior governmental

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**election**, the reasonable costs of such agent...

[5] §112(e)(2) "...any copyright owners of sound recordings...may designate common agents to negotiate, agree to, pay, or receive...royalty payments."

[6] §114(e)(1) "...in negotiating statutory licenses in accordance with subsection (f), ***any copyright owners of sound recordings*** and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and ***may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments."***

§114(e)(2) "For licenses...other than statutory licenses...copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments:..."

[7] As the Panel acknowledged, "Copyright owners *and performers,* on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates" Report at 132 (emphasis added). The Register agrees. It was arbitrary to permit Copyright Owners to make an election that Performers are not permitted to make. The Register can conceive of no reason why Performers should not be given the same choice. Accordingly, the

or regulatory designation. The statute clearly makes "designation" the choice of the copyright owner. Further, in the previous Webcasting CARP the Librarian of Congress extended to featured performers, as well, the right to choose the agent that will represent them[7]. That choice is meaningless if there is only one agent.

However, Copyright Office regulations, dating back to the first pre-existing services CARP,[8] take the choice away from the copyright owner and place it in a regulatory process. The regulatory process defies rationality when it is interpreted to require a competitive agent, already designated in one regulatory proceeding, to obtain "designated" agent status in each and every regulatory proceeding (a process that could take years) before it can offer and continue to offer the full statutory license collection and distribution services contemplated by the statute and demanded by its affiliates.

RLI contends that this cumbersome multi-year "designation" process, serving no useful policy goal, has been superceded by enactment of the SWSA. Congress gave RIAA/SoundExchange the right to deduct certain costs, however, new section 114(g)(3) contains an important exemption:

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Register recommends that § 261.4 be amended to provide that a Copyright Owner or a Performer may make such an election. *See* § 261.4(c) of the recommended regulatory text. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule*, 67 Fed. Reg. 45239 (July 8, 2002) (the "Webcaster Decision")

[8] 37 C.F.R. §201.37(b)(1) provides "A Collective is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f)."

> "A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto **other than copyright owners and performers who have elected to receive royalties from another Designated Agent and have notified such nonprofit agent in writing of such election**, the reasonable costs of such agent..."

As §114(g)(3) makes clear, Congress codified the right to choose among competing agents, and provided that both performers and copyright owners have the absolute right to choose a Designated Agent other than RIAA/SoundExchange so as to avoid the recoupment of historical litigation and other costs.[9] Notably, 114(g)(3) applies to all transmission services operating pursuant to statutory licenses (i.e., pre-existing subscription, eligible non-subscription, etc.). Therefore, if RIAA/SoundExchange can recoup costs against receipts from all statutory licensees – then, the choice of agents and the exemption for the purpose of avoiding cost recoupment (i.e., through affiliation with "another Designated Agent") must also apply to receipts from all statutory licensees. Accordingly, the effect of 114(g)(3) is to fully authorize RLI to collect and distribute receipts from all statutory licenses and licensees without need for further regulatory designation. Moreover, the SWSA exemption (i.e., barring cost recoupment through affiliation with another agent) is a statutory right of copyright owners and performers. RIAA cannot avoid this reality by eliminating RLI's designation, obtained through the CARP process, with the device of a "claimed" industry-wide voluntary settlement ignoring that statutory right,

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[9] The RIAA has previously characterized RLI and its affiliates as "free riders" because they have not shared the costs of establishing statutory license fees. However, RLI and its affiliates had little or no meaningful opportunity to influence those in the driver's seat. RIAA made this argument to Congress prior to passage of the SWSA. Congress already considered the argument, and rejected it. RIAA/SoundExchange should not now be permitted to obtain through the back door what Congress determined not to give them at all.

Therefore, only two conclusions are possible after enactment of the SWSA. Either any party can function as a Designated Agent (on choice of the copyright owner), or the two CARP authorized agents in existence at the time of enactment must be fully and equally designated to perform all collection and distribution functions. The proposed regulations in this proceeding must be modified accordingly. Further, 37 C.F.R. §201.37(b)(1) should either be deleted entirely or modified by addition of the following sentence:

> "A Collective, once designated, may collect license fees payable pursuant to all section 112(e) and 114(f) statutory licenses directly from statutory licensees (unless such Collective agrees to allow statutory licensees to make payment to an independent escrow agent for further allocation and distribution to all Collectives) and distribute such royalties to copyright owners and performers."

**III. If "designation" should still be required, the CARP must once and for all designate RLI to collect and distribute all §112 and §114 statutory license fees collected from all transmission services.**

RLI, having been authorized in the previous Webcasting CARP to offer competitive services and effectuate the choice guaranteed to performers and copyright owners, must be entitled to operate across all statutory licenses for the benefit of its members and be able to continue to do so. The RIAA (a trade association representing the major record labels), in lock step[10] with the American Federation of Musicians and the American Federation of Television and Radio Artists (the unions representing background singers and musicians), should not be allowed to unilaterally eliminate designated competition solely by entering into anti-competitive agreements and forcing RLI into expensive litigation just to survive.

Failure to designate RLI as a Designated Agent will force many performers and copyright owners, against their will, to receive the statutory portion of their royalties through

RIAA/SoundExchange or, in the event of the demise of RIAA/SoundExchange (as apparently contemplated by the proposed regulations)[11] some other unknown or unproven agent (perhaps owned by the RIAA, the major labels AFTRA, AFM, etc.). No law or regulation should force RLI affiliates to receive royalties from an entity that they did not choose.

## IV. RLI's designation will foster the availability of new music to transmission services and provide efficiencies for copyright owners and performers.

Digital transmission services hold the promise of making vast amounts of music available to the public – including genres and artists left behind by traditional radio and the major record labels and distributors (e.g., unsigned performers, artists who have been dropped from their major label deals, etc.). Digital transmission technologies (webcasting, subscription services, etc.) create more channels and opportunities for artists to exercise self determination, reach an audience and develop a relationship with the public – bypassing the major record label distributors and the traditional radio gatekeepers.

Section 114, as amended, recognizes this democratization of digital music distribution and creates a performance right for the digital transmission of sound recordings. It contemplates both statutory licenses and the ability of individual copyright owners and transmission services to enter into direct voluntary licenses that take precedence over

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[10] Please refer to the Comments of the AFM and AFTRA objecting to the Supplemental Comments of RLI in the pending pre-existing subscription services proceeding.

[11] §262.4 provides "If SoundExchange should fail to incorporate by July 1, 2003, dissolve or cease to be governed by a board consisting of equal number of representatives of Performers and Copyright Owners, then it *shall be replaced by successor entities* upon...(A)...majority vote of the nine copyright owner representatives on the SoundExchange Board...(B)...majority vote of the nine performer representatives on the SoundExchange Board....

statutory license terms. Indeed, §262.1(c) of the proposed regulations specifically provides for voluntary licenses to take precedence over statutory licenses.[12] In practice, for example, a new artist may wish to grant a license at a reduced rate or waive the play list restrictions of the statutory license in exchange for promotional benefits. Indeed, for new artists the ability to enter into such voluntary transactions is a way to get exposure outside the traditional radio airplay system.

Copyright owners and performers have chosen to affiliate with RLI because they seek to be represented by a single independent administrator that can 1) license and collect royalties from voluntary licenses that authorize the promotion, transmission and distribution of recordings, and 2) collect and distribute royalties from transmissions authorized pursuant to all of the statutory licenses and 3) enable their own competition with the major labels.

If RLI is not designated to collect and distribute all royalties, the administration of their royalties will become fragmented and they will be forced to use multiple agents creating an expensive and burdensome record keeping nightmare. Practically, RLI affiliates would have to send information on past, current and future catalog sound recordings and performances to multiple agents. In addition, they would be forced to send payment information to multiple agents, provide tax information to multiple agents, monitor the timing and accuracy of payments received from multiple agents and perform audits on multiple agents. Collecting all of their royalties through a single administrator of their choosing for all

[12] §262.1(c) **Relationship to voluntary agreements.** Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services shall apply in lieu of the rates and terms of this part to transmissions within the scope of such agreements.

their §114 royalties is the best way for them to insure the prompt, efficient and fair payment of royalties with a minimum of expense.

## V. Multiple Agents have Proven Beneficial and Desirable in Other Compulsory and Music Licensing Contexts.

Provisions of existing statutory licenses applicable to music copyrights (*e.g.*, Sections 112(e)(2), 114(e)(1-2), 115(c)(3)(B) and 116(b)(2)) are consistent in providing that copyright owners "...may designate common agents to negotiate, agree to, pay or receive royalty payments." Multiple common agents, chosen at the discretion of the copyright owner, function in the administration of the section 115 statutory license (*e.g.,* Harry Fox Agency, MCS Music America, Inc., Bug Music, Wixen Music Publishing, Inc., Mizmo Enterprises, etc.) without any Copyright Office regulation or oversight as to who may function in that capacity, when such common agents may commence operation or how they operate. Other copyright owners administer these rights themselves or through their lawyers. In the context of the performance of musical works, there are three well-established agents representing songwriters and music publishers, ASCAP, BMI and SESAC. At one time BMI (an entity owned by broadcasters) represented only a few gospel and country writers and publishers. Now, BMI represents approximately the same market share as ASCAP, and the membership rolls of SESAC continue to grow as well.

RLI respectfully submits that such related experience in the music industry suggests that copyright owners and performers also will desire, and benefit from, having a competitive choice among agents for the distribution of sound recording performance royalties. Multiple agents will compete for clients based upon the benefits each offers to its respective members. Such benefits may take the form of lower administration costs, more flexible terms, more

frequent payments, greater transparency in operation, better access to information, and other terms that confer potential benefits upon the membership. Thus, giving a choice to copyright owners and performers will stimulate each agent to offer better service and better terms, and thereby promote the purposes and the benefits of the statutory license.

## VI. RLI's Designation Will Deliver to its Client Copyright Owners and Performers the Benefits Congress Intended to Confer Upon Them through the SWSA.

By enacting the SWSA, Congress permitted a non-profit agent (i.e., RIAA/SoundExchange) to deduct particular costs from royalties to be distributed under the statutory license, with a specific exception that is directly relevant here. New Section 114(g)(3)[13], reflects two important policies relevant to this proceeding. First, Congress acknowledged and contemplated that more than one entity could serve as a Designated Agent in competition with SoundExchange. Thus, Congress acknowledged implicitly the benefits of competition among agents that administer the royalties. Second, while Congress acceded to SoundExchange's request to deduct CARP and other costs from the royalties payable to SoundExchange members, Congress specifically prohibited SoundExchange from deducting royalties payable to clients of competing agents. Thus, Congress codified the right to choose among competing agents, and provided that performers and copyright owners have the absolute right to choose a Designated Agent other than SoundExchange so as to avoid the recoupment of historical litigation and other costs.

[13] Section 114(g)(3) is repeated here for emphasis: "A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto **other than copyright owners and performers who have elected to receive royalties from another Designated Agent and have notified such nonprofit agent in writing of such election**, the reasonable costs of such agent..."

As noted previously, RLI believes that the so-called "voluntary" agreements have been made contingent on the services agreeing to RIAA/SoundExchange being the sole Designated Agent. RLI respectfully submits that it would be extraordinary and inappropriate for private parties to thus thwart the will of Congress by eliminating, by private agreement, the sole competitor to SoundExchange that Congress assured would not be saddled with expenses that neither it nor its clients incurred. Indeed, section 114(g)(3), and in particular the language in footnote 13 highlighted in bold, was amended by Congress following introduction of the bill, specifically to protect the interests of non-SoundExchange-member copyright owners and performers.

If the interests of copyright owners and performers are to be protected and served, as Congress intended, then they deserve as an alternative to SoundExchange a financially-sound competitor that can administer all royalty payments across all statutory licenses. RLI is ready to be that competitor.

## VII. RLI objects to the concept of the "receiving agent" and more importantly to the concept that the "receiving agent" and a "Designated Agent" can be the same party.

The regulations that require all licensees to pay one entity called the "receiving agent" and also allow RIAA/SoundExchange to be both the receiving agent and a Designated Agent create an inherently suspicious situation - rife with the possibility of co-mingling of funds - as there is insufficient control over the acts of the receiving agent. For example, there is no requirement that the receiving agent hold monies in a separate, interest bearing account. Nothing appears to prohibit the receiving agent that is also a Designated Agent from utilizing the funds in any manner for its own purposes prior to allocation to the Designated Agents. For example, a receiving agent that is also a Designated Agent could delay allocation of

receipts among Designated Agents, control the cash flow and create a pool of money from which to offer advances that a competing Designated Agent could not offer.

Instead, to prevent such abuse, the regulations should provide that license fees be paid either directly to the Designated Agents[14] or, in the alternative, to an independent escrow agent established, controlled and maintained jointly by the Designated Agents, which holds license fees in trust in separate/segregated interest bearing accounts pending pro-rata allocation among the Designated Agents on mutual agreement of the Designated Agents. License receipts paid to an independent escrow agent, would be apportioned on a reasonable basis valuing all performances equally using a methodology which is agreed upon among the agents. Escrow and allocation costs would be shared on a pro rata basis.[15] The regulations must create a level playing field among the Designated Agents with each agent entitled to receive the same information from licensees (i.e., Notice of Intent to utilize the statutory license, monthly statement of account and monthly records of use of sound recordings). As long as a level playing field is maintained among the Designated Agents with mutual right to approve the ground rules for the independent escrow agent then copyright owners and performers could look to their Designated Agent to protect their interests.

RLI believes that the proven way to provide administrative efficiencies, minimize transaction costs and maximize distributions to copyright owners and performers is to enable a competitive market place in which in which license fees are paid to an independent escrow

[14] The Designated Agents could post on their websites a list of their copyright owner and performer affiliates so that Licensees could determine the amount of the royalty payments due each Designated Agent.

[15] The Copyright Office should take notice of the fact that many of these controls were first established in the previous Webcasting CARP. Indeed, the proposed regulations would also apply these principals in a two agent scenario but only where RLI has first been eliminated and the two agents are exclusively successor entities of RIAA/SoundExchange.

agent mutually controlled by the Designated Agents and in which Designated Agents compete for the representation of copyright owners and performers on price (i.e., administrative fees and costs), terms and available services.

**VIII. RLI objects to the regulations providing for the break-up of SoundExchange.**

It is plain from the terms of Section 262.4(b)(2)[16] of the proposed regulations that the major label copyright owners, AFM and AFTRA having among themselves attempted to prevent the RLI designation, are already planning for the demise of SoundExchange without having to also deal with marketplace competition from RLI.

On its demise, two entities would be formed, one by the major label members of the SoundExchange board and one by the "performer" members of the board. If RLI is not designated, RLI members would be forced on the demise of SoundExchange to receive their royalties through some as yet unnamed and unproven successor agents perhaps owned by the major labels, perhaps owned by AFM/AFTRA. It would be grossly unfair for the successor entities to be able to divide among themselves the representation of featured performers and copyright owners (as provided for in the proposed regulations)[17] without approval and without any oversight as to the capability of the successor entities to administer such royalties.

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[16] §262.4 provides "If SoundExchange should fail to incorporate by July 1, 2003, dissolve or cease to be governed by a board consisting of equal number of representatives of Performers and Copyright Owners, then it *shall be replaced by successor entities* upon...(A)...majority vote of the nine copyright owner representatives on the SoundExchange Board...(B)...majority vote of the nine performer representatives on the SoundExchange Board...."

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If the parties currently controlling SoundExchange (the same parties seeking to deny RLI its full designation) can only resolve their internal issues by separating into two successor entities, the successor entities should be subject to the same designation requirements they seek to place on RLI. In other words, after dissolution, they should be required to again seek Designated Agent status in each and every statutory license negotiation/CARP (however many years that may take) prior to commencing operations. They cannot get a "free pass" to full, equal and instant designation on a contingency, without having to first prove their capacity to perform the collection and distribution functions. Therefore, the provisions relating to the demise of SoundExchange should be deleted.

## IX. Conclusion

For the reasons set forth above, on behalf of its affiliates and itself, RLI respectfully objects to the proposed regulations. For the convenience of the parties, and in the hope that constructive dialogue among the parties may yet avoid a CARP proceeding, RLI attaches hereto as Appendix A proposed alternative regulations that would provide for multiple Designated Agents and other administrative issues.

Pursuant to the Notice of Proposed Rulemaking, and out of an abundance of caution, RLI submits herewith a Notice of Intent to Participate in any arbitration in this proceeding.

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[17] Section 262.4(b)(3)(D) provides "The Designated Agents shall agree between themselves concerning responsibility for distributing royalty payments to Copyright Owners and Performers that have not themselves authorized either Designated Agent."

Respectfully submitted,

Date: June 5, 2003

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**Before the**
**LIBRARY OF CONGRESS**
**UNITED STATES COPYRIGHT OFFICE**
**Washington, D.C.**

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| In the Matter of | ) | |
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| Digital Performance Right in | ) | Docket No. 2002-1 CARP DSTRA 3 |
| Sound Recordings | ) | 2000-2 CARP DTNSRA |
| Rate Adjustment | ) | |
| | ) | |

## NOTICE OF INTENT TO PARTICIPATE


| | |
|---|---|
| Name: | **Royalty Logic, Inc.** |
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| Telephone: | 818-558-1400 |
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| Contact: | Ronald Gertz |


Royalty Logic, Inc. ("RLI"), pursuant to 17 U.S.C. § 801, the Notice of Proposed Rulemaking published by the Copyright Office at 68 Fed. Reg. 27506 (May 20, 2003), and Part 251 of the Rules of the Copyright Office, 37 C.F.R. § 251, hereby submits its Notice of Intent to Participate in the above-captioned proceedings of the Copyright Arbitration Royalty Panel ("CARP") to determine certain terms of the statutory licenses for the performance of sound recordings under 17 U.S.C. § 114, and for the making by them of ephemeral recordings under 17 U.S.C. § 112(e). RLI has been approved by the Librarian, in Docket No. 2000-9 CARP DTRA 1&2, as a Designated Agent for the distribution of sound recording performance and multiple ephemeral recording royalty payments made by eligible nonsubscription services. 37 C.F.R. § 261.4(b) (2002). RLI wishes to participate in this proceeding solely with respect to the

designation of Designated Agent(s), and all terms and conditions of the licenses and any regulations relating to the pertaining to such agents.

Respectfully submitted,

Date: June 5, 2003

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**Exhibit A**
**RLI Proposed Regulations**

PART 262 – RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Sec.
262.1 General.
262.2 Definitions.
262.3 Royalty fees for public performance of sound recordings and for ephemeral recordings.
262.4 Terms for making payment of royalty fees and statements of account.
262.5 Confidential information.
262.6 Verification of statements of account.
262.7 Verification of royalty payments.
262.8 Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114, 801(b)(1).

**§ 262.1 General.**

(a) **Scope.** This part 262 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by certain Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period 2003-2004 and in the case of Subscription Services 1998-2004 (the "License Period").

(b) **Legal compliance.** Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 shall comply with the requirements of those sections, the rates and terms of this part and any other applicable regulations.

(c) **Relationship to voluntary agreements.** Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services shall apply in lieu of the rates and terms of this part to transmissions within the scope of such agreements.

**§ 262.2 Definitions.**

For purposes of this part, the following definitions shall apply:

(a) **Aggregate Tuning Hours** means the total hours of programming that the Licensee has transmitted during the relevant period to all Listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio

transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous Listeners, the service's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one Listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

(b) **Broadcast Simulcast** means (i) a simultaneous Internet transmission or retransmission of an over-the-air terrestrial AM or FM radio broadcast, including one with previously broadcast programming substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained and one with substitute advertisements, and (ii) an Internet transmission in accordance with 17 U.S.C. 114(d)(2)(C)(iii) of an archived program, which program was previously broadcast over-the-air by a terrestrial AM or FM broadcast radio station, in either case whether such Internet transmission or retransmission is made by the owner and operator of the AM or FM radio station that makes the broadcast or by a third party.

(c) **Business Establishment Service** means a service making transmissions of sound recordings under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv).

(d) **Copyright Owner** is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

(e) **Designated Agent** is ~~the agent designated by the Librarian of Congress as provided in § 262.4(b).~~an agent designated by the Librarian of Congress for the receipt of royalty payments made pursuant to this part. The Designated Agent shall make further distribution of those royalty payments to Copyright Owners and Performers as provided in §262.4(b)(1).

(f) **Ephemeral Recording** is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) or for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f) , and subject to the limitations specified in 17 U.S.C. 112(e).

(g) **Escrow Agent** is the agent designated by mutual agreement of the Designated Agents for the collection of royalty payments made pursuant to this part by Licensees and the distribution of those royalty payments to the Designated Agents.

(hg) **Licensee** is a person or entity that (i) has obtained a compulsory license under 17 U.S.C. 114 and the implementing regulations therefor to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)), or that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make Ephemeral Recordings for use in facilitating such transmissions, or (ii) is a Business Establishment Service that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make Ephemeral Recordings, but not a person or entity that:

(1) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(2) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(3) is a State or possession or any governmental entity or subordinate thereof, or the United States or District of Columbia, making transmissions for exclusively public purposes.

(ih) **Listener** is a player, receiving device or other point receiving and rendering a transmission of a public performance of a sound recording made by a Licensee, irrespective of the number of individuals present to hear the transmission.

(ji) **Nonsubscription Service** means a service making eligible nonsubscription transmissions.

(kj) **Performance** is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(1) a performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(2) a performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) an incidental performance that both: (i) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and (ii) other than ambient music that is background at a public event, does not contain an entire sound recording and does

not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(~~lk~~) **Performers** means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

(~~ml~~) **Subscription Service** means a new subscription service (as defined in 17 U.S.C. 114(j)(8)) making noninteractive digital audio transmissions.

(~~nm~~) **Subscription Service Revenues** shall mean all monies and other consideration paid or payable, including the fair market value of non-cash or in-kind consideration paid or payable by third parties, from the operation of a Subscription Service, as comprised of the following:

(1) subscription fees and other monies and consideration paid for access to the Subscription Service by or on behalf of subscribers receiving within the United States transmissions made as part of the Subscription Service;

(2) monies and other consideration (including without limitation customer acquisition fees) from audio or visual advertising, promotions, sponsorships, time or space exclusively or predominantly targeted to subscribers of the Subscription Service, whether (i) on or through the Subscription Service media player, or on pages accessible only by subscribers or that are predominantly targeted to subscribers, or (ii) in e-mails addressed exclusively or predominantly to subscribers of the Subscription Service, or (iii) delivered exclusively or predominantly to subscribers of the Subscription Service in some other manner, in each case less advertising agency commissions (not to exceed 15% of those monies and other consideration) actually paid to a recognized advertising agency not owned or controlled by Licensee;

(3) monies and other consideration (including without limitation the proceeds of any revenue-sharing or commission arrangements with any fulfillment company or other third party, and any charge for shipping or handling) from the sale of any product or service directly through the Subscription Service media player or through pages or advertisements accessible only by subscribers or that are predominantly targeted to subscribers (but not pages or advertisements that are not predominantly targeted to subscribers), less (i) monies and other consideration from the sale of phonorecords and digital phonorecord deliveries of sound recordings, (ii) the Licensee's actual, out-of-pocket cost to purchase for resale the products or services (except phonorecords and digital phonorecord deliveries of sound recordings) from third parties, or in the case of products produced or services provided by the Licensee, the Licensee's actual cost to produce the product or provide the service (but not more than the fair market wholesale value of the product or service), and (iii) sales and use taxes, shipping, and credit card and fulfillment service fees actually paid to unrelated third parties; provided that: (A) the fact that a transaction is consummated on a different page than the page/location where a potential customer responds to a "buy button" or other purchase opportunity for a product or service advertised directly through such player, pages or advertisements shall not

render such purchase outside the scope of Subscription Service Revenues hereunder, and (B) monies and other consideration paid by or on behalf of subscribers for software or any other access device owned by Licensee (or any subsidiary or other affiliate of the Licensee, but excluding, for the avoidance of doubt, any entity that sells a third party product, whether or not bearing the Licensee's brand) to access the Licensee's Subscription Service shall not be deemed part of Subscription Service Revenues, unless such software or access device is required as a condition to access the Subscription Service and either is purchased by a subscriber contemporaneously with or after subscribing or has no independent function other than to access the Subscription Service;

(4) monies and other consideration for the use or exploitation of data specifically and separately concerning subscribers or the Subscription Service, but not monies and other consideration for the use or exploitation of data wherein information concerning subscribers or the Subscription Service is commingled with and not separated or distinguished from data that predominantly concern nonsubscribers or other services; and

(5) Bad debts recovered with respect to § 262.2(m)(1) through (4); provided that the Subscription Service shall be permitted to deduct bad debts actually written off during a reporting period.

**§ 262.3 Royalty fees for public performances of sound recordings and for ephemeral recordings.**

(a) **Basic royalty rate.** Royalty rates and fees for (i) eligible nonsubscription transmissions made by Licensees pursuant to 17 U.S.C. 114(d)(2) during the period January 1, 2003, through December 31, 2004, and the making of Ephemeral Recordings pursuant to 17 U.S.C. 112(e) to facilitate such transmissions, (ii) noninteractive digital audio transmissions made by Licensees pursuant to 17 U.S.C. 114(d)(2) as part of a new subscription service during the period October 28, 1998, through December 31, 2004, , and the making of Ephemeral Recordings pursuant to 17 U.S.C. 112(e) to facilitate such transmissions, and (iii) the making of Ephemeral Recordings by Business Establishment Services pursuant to 17 U.S.C. 112(e) during the period January 1, 2003, through December 31, 2004, shall be as follows:

(1) **Nonsubscription Services.** For their operation of Nonsubscription Services, Licensees other than Business Establishment Services shall, at their election as provided in § 262.3(b), pay at one of the following rates:

(A) **Per Performance Option.** $0.000762 (0.0762¢) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under section 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensees electing this

payment option irrespective of the Licensee's actual experience in respect of partial Performances.

(B) **Aggregate Tuning Hour Option.**

(i) **Non-Music Programming.** $0.000762 (0.0762¢) per Aggregate Tuning Hour for programming reasonably classified as news, talk, sports or business programming.

(ii) **Broadcast Simulcasts.** $0.0088 (0.88¢) per Aggregate Tuning Hour for Broadcast Simulcast programming not reasonably classified as news, talk, sports or business programming.

(iii) **Other Programming.** $0.0117 (1.17¢) per Aggregate Tuning Hour for programming other than Broadcast Simulcast programming and programming reasonably classified as news, talk, sports or business programming.

(2) **Subscription Services.** For their operation of Subscription Services, Licensees other than Business Establishment Services shall, at their election as provided in § 262.3(b), pay at one of the following rates:

(A) **Per Performance Option.** $0.000762 (0.0762¢) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under section 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensees electing this payment option irrespective of the Licensee's actual experience in respect of partial performances.

(B) **Aggregate Tuning Hour Option.**

(i) **Non-Music Programming.** $0.000762 (0.0762¢) per Aggregate Tuning Hour for programming reasonably classified as news, talk, sports or business programming.

(ii) **Broadcast Simulcasts.** $0.0088 (0.88¢) per Aggregate Tuning Hour for Broadcast Simulcast programming not reasonably classified as news, talk, sports or business programming.

(iii) **Other Programming.** $0.0117 (1.17¢) per Aggregate Tuning Hour for programming other than Broadcast Simulcast programming and programming reasonably classified as news, talk, sports or business programming.

(C) **Percentage of Subscription Service Revenues Option.** 10.9% of Subscription Service Revenues, but in no event less than 27¢ per month for each person who subscribes to the Subscription Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by Licensee without a fee (e.g., during a free trial period), subject to the following reduction associated with the transmission of directly licensed sound recordings (if applicable). For any given payment period, the fee due from Licensee shall be the amount calculated under the formula described in the immediately preceding sentence multiplied by the following fraction: the total number of Performances (as defined under § 262.2(j) hereof, which excludes directly licensed sound recordings) made by the Subscription Service during the period in question, divided by the total number of digital audio transmissions of sound recordings made by the Subscription Service during the period in question (inclusive of Performances and equivalent transmissions of directly licensed sound recordings). Any Licensee paying on such basis shall report to the Designated Agent on its statements of account the pertinent music use information upon which such reduction has been calculated. This option shall not be available to a Subscription Service where (i) a particular computer software product or other access device must be purchased for a separate fee from the Licensee as a condition of receiving transmissions of sound recordings through the Subscription Service, and the Licensee chooses not to include sales of such software product or other device to subscribers as part of Subscription Service Revenues in accordance with § 262.2(m)(3) hereof, or (ii) the consideration paid or given to receive the Subscription Service also entitles the subscriber to receive or have access to material, products or services other than the Subscription Service (for example, as in the case of a "bundled service" consisting of access to the Subscription Service and also access to the Internet in general). In all events, in order to be eligible for this payment option, a Licensee may not engage in pricing practices whereby the Subscription Service is offered to subscribers on a "loss leader" basis or whereby the price of the Subscription Service is materially subsidized by payments made by the subscribers for other products or services.

(3) **Business Establishment Services.** For the making of any number of Ephemeral Recordings in the operation of a service pursuant to the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), a Licensee that is a Business Establishment Service shall pay 10% of such Licensee's "Gross Proceeds" derived from the use in such service of musical programs that are attributable to copyrighted recordings. "Gross Proceeds" as used in this § 262.3(a)(3) means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of: (A) for classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and (B) for all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(b) **Election process.** A Licensee other than a Business Establishment Service shall elect the particular Nonsubscription Service and/or Subscription Service royalty rate categories it chooses (that is, among § 262.3(a)(1)(A) or (B) and/or § 262.3(a)(2)(A), (B) or (C)) for the License Period by no later than the date 30 days after these rates and terms are adopted by the Librarian of Congress and published in the Federal Register. Notwithstanding the preceding sentence, where a Licensee has not previously provided a Nonsubscription Service or Subscription Service, as the case may be, the Licensee may make its election by no later than thirty (30) days after the new service first makes a digital audio transmission of a sound recording under the section 114 statutory license. Each such election shall be made by notifying the Designated Agent(s) in writing of such election, using an election form provided by the Designated Agent(s). A Licensee that fails to make a timely election shall pay royalties as provided in § 262.3(a)(1)(A) and § 262.3(a)(2)(A), as applicable. Notwithstanding the foregoing, a Licensee eligible to make royalty payments under an agreement entered into pursuant to the Small Webcaster Settlement Act of 2002 may elect to make payments under such agreement as specified in such agreement.

(c) **Ephemeral Recordings.** The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Licensee other than a Business Establishment Service during the License Period, and used solely by the Licensee to facilitate transmissions for which it pays royalties as and when provided in this section and § 262.4 shall be deemed to be included within, and to comprise 8.8% of, such royalty payments. The royalty payable under 17 U.S.C. 112(e) for the reproduction of phonorecords by a Business Establishment Service shall be as set forth in § 262.3(a)(3).

(d) **Minimum fee.**

(1) **Business Establishment Services.** Each Licensee that is a Business Establishment Service shall pay a minimum fee of $10,000 for each calendar year in which it makes Ephemeral Recordings for use to facilitate transmissions under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv), whether or not it does so for all or any part of the year.

(2) **Other Services.** Each Licensee other than a Business Establishment Service shall pay a minimum fee of $2,500, or $500 per channel or station (excluding archived programs, but in no event less than $500 per Licensee), whichever is less, for each calendar year in which it makes eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings for use to facilitate such transmissions, whether or not it does the foregoing for all or any part of the year; except that the minimum annual fee for a Licensee electing to pay under § 262.3(a)(2)(C) hereof shall be $5,000.

(3) **In General.** These minimum fees shall be nonrefundable, but shall be fully creditable to royalty payments due under § 262.3(a) for the same calendar year (but not any subsequent calendar year).

(e) **Continuing Obligation**. For the limited purpose of the period immediately following the License Period, and on an entirely without prejudice and nonprecedential basis relative to other time periods and proceedings, if successor statutory royalty rates for Licensees for the period beginning January 1, 2005 have not been established by January 1, 2005, then Licensees shall pay to the Designated Agent(s), effective January 1, 2005 and continuing for the period through April 30, 2005 or until successor rates and terms are established, whichever is earlier, an interim royalty pursuant to the same rates and terms as are provided for the License Period. Such interim royalties shall be subject to retroactive adjustment based on the final successor rates. Any overpayment shall be fully creditable to future payments, and any underpayment shall be paid within thirty days after establishment of the successor rates and terms, except as may otherwise be provided in the successor terms. If there is a period of such interim payments, Licensees shall elect the particular royalty rate categories it chooses for the interim period as described in § 262.3(b), except that the election for a service that is in operation shall be made by no later than January 15, 2005.

(f) **Other royalty rates and terms.** This Part 262 does not apply to persons or entities other than Licensees, or to Licensees to the extent that they make other types of transmissions beyond those set forth in § 262.3(a). For transmissions other than those governed by § 262.3(a) hereof, or the use of Ephemeral Recordings to facilitate such transmissions, persons making such transmissions must pay royalties, to the extent (if at all) applicable, under Section 112(e) and 114 or as prescribed by other law, regulation or agreement.

**§ 262.4 Terms for making payment of royalty fees and statements of account.**

(a) **Payment to** Escrow Agent~~designated agent.~~ A Licensee shall make the royalty payments due under § 262.3 to the ~~Designated~~Escrow Agent. In the absence of an Escrow Agent:

(1) A Licensee shall make the royalty payments due under § 262.3 directly to the Designated Agent(s), and.

(2) The Designated Agents shall post on their websites a list of affiliated Copyright Owners and Performers from which Licensees may determine the amount of the royalty payments due each Designated Agent.

(b) **Designation of ~~agent and potential successor designated~~ agents.**

(1) Until such time as a new designation is made, SoundExchange, presently an unincorporated division of the Recording Industry Association of America, Inc. ("RIAA"), and Royalty Logic, Inc. are designated as Designated Agents to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) and 114(g)(2).~~is designated as the Designated Agent to receive statements of account and royalty payments from Licensees due under § 262.3 and to distribute such royalty payments to each Copyright Owner and Performer entitled to~~

~~receive royalties under 17 U.S.C. 112(e) or 114(g).~~ SoundExchange shall continue to be designated after its separate incorporation and Royalty Logic, Inc. shall continue to be designated should it elect to become a not for profit corporation.~~.~~

(2) SoundExchange is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 114(g)(2), except when a Copyright Owner or Performer has notified SoundExchange in writing of an election to receive royalties from Royalty Logic, Inc. With respect to any royalty payment received by the Escrow Agent from a Licensee, a designation by a Copyright Owner or Performer of a particular Designated Agent must be made no later than thirty days prior to the allocation of receipts for any period by the Escrow Agent. In the event of a dissolution of SoundExchange, Royalty Logic, Inc. is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer.

~~(2) If SoundExchange should fail to incorporate by July 1, 2003, dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by successor entities upon the fulfillment of the requirements set forth in (A) and (B) below.~~

~~(A) By a majority vote of the nine copyright owner representatives on the SoundExchange Board as of the last day preceding the condition precedent in § 262.4(b)(2) above, such representatives shall file a petition with the Copyright Office designating a successor Designated Agent to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Designated Agent.~~

~~(B) By a majority vote of the nine performer representatives on the SoundExchange Board as of the last day preceding the condition precedent in 262.4(b)(2), such representatives shall file a petition with the Copyright Office designating a successor Designated Agent to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Designated Agent.~~

~~(C) The Copyright Office shall publish in the Federal Register within thirty days of receipt of a petition filed under § 262.4(b)(2)(A) or (B) an order designating the Designated Agents named in such petitions. Nothing contained herein shall prohibit the petitions filed under § 262.4(b)(2)(A) and (B) from naming the same successor Designated Agent.~~

~~(3) If petitions are filed under § 262.4(b)(2)(A) and (B), then, following the actions of the Copyright Office in accordance with § 262.4(b)(2)(C):~~

~~(A) Each of the successor entities shall have all the rights and responsibilities of a Designated Agent under this Part 262, except as specifically set forth in this § 262.4(b)(3).~~

(3) ~~(B)~~ Licensees shall make their royalty payments to the ~~successor entity named by the copyright owner representatives under § 262.4(b)(2)(A) (the "Receiving Agent")~~Escrow Agent and shall provide statements of account on a form prepared by mutual agreement of the ~~the Receiving~~Designated Agent(s). Licensees shall submit a copy of each statement of account to the Designated Agents~~collective named by the performer representatives under § 262.4(b)(2)(B)~~ at the same time such statement of account is delivered to the ~~Receiving~~Escrow Agent.

(4) ~~(C) The Designated Agents shall agree between themselves concerning responsibility for distributing royalty payments to Copyright Owners and Performers that have not themselves authorized either Designated Agent.~~ The Designated Agents ~~also~~ shall agree to a corresponding methodology for allocating royalty payments between them using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such allocation shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Designated Agents. ~~Such methodology shall value all performances equally.~~ Within 30 days after their agreement concerning such responsibility and methodology, the Designated Agents shall inform the Register of Copyrights thereof.

(5) ~~(D)~~ With respect to any royalty payment received by the Escrow~~Receiving~~ Agent from a Licensee, a designation by a Copyright Owner or Performer of a Designated Agent must be made no later than 30 days prior to the ~~receipt~~allocation by the Escrow~~Receiving~~ Agent of that royalty payment.

(6) ~~(E) The Receiving~~The Escrow Agent shall promptly allocate the royalty payments it receives between the two Designated Agents in accordance with the agreed methodology. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the ~~Receiving~~Designated Agents ~~and the collectives named under § 262.4(b)(2)~~ for each calendar year no later than 180 days following the end of each calendar year. The Designated Agents shall agree on a reasonable basis for the sharing on a pro-rata basis of any costs associated with the allocations set forth in § 262.4(b)(4)~~(3)(C)~~.

(7) ~~(F)~~ If a Designated Agent is unable to locate a Copyright Owner or Performer that the Designated Agent otherwise would be required to pay under this § 262.4(b) within three years from the date of payment by Licensee, such Copyright Owner's or Performer's share of the payments made by Licensees may ~~first~~ be applied to the costs ~~directly~~ attributable to the administration of the royalty payments due such Copyright Owners and Performers by that Designated Agent. ~~and shall thereafter be allocated between the Designated Agents on a pro rata basis (based on distributions to entitled parties) to offset any costs permitted to be deducted by a designated agent under 17 U.S.C. 114(g)(3)~~. The foregoing shall apply notwithstanding the common law or statutes of any state.

(c) **Monthly payments.** A Licensee shall make any payments due under § 262.3(a) by the 45th day after the end of each month for that month, except that payments due under § 262.3(a) for the period from the beginning of the License Period through the last day of the month in which these rates and terms are adopted by the Librarian of Congress and published in the Federal Register shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(d) **Minimum payments.** A Licensee shall make any payment due under § 262.3(d) by January 31 of the applicable calendar year, except that:

(1) payment due under § 262.3(d) for 2003, and in the case of a Subscription Service any earlier year, shall be due 45 days after the last day of the month in which these rates and terms are adopted by the Librarian of Congress and published in the Federal Register; and

(2) payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to licenses under 17 U.S.C. 114(f) and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) **Late payments.** A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Designated Agent after the due date. Late fees shall accrue from the due date until payment is received by the Designated Agent.

(f) **Statements of account.** For any part of the period beginning on the date these rates and terms are adopted by the Librarian of Congress and published in the Federal Register and ending on December 31, 2004, during which a Licensee operates a service, by 45 days after the end of each month during the period, the Licensee shall deliver to the Designated Agent a statement of account containing the information set forth below on a form prepared, and made available to Licensees, by the Designated Agent. If a payment is owed for such month, the statement of account shall accompany the payment. A statement of account shall include only the following information:

(1) such information as is necessary to calculate the accompanying royalty payment, or if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month, including, as applicable, the Performances, Aggregate Tuning Hours (to the nearest minute) or Subscription Service Revenues for the month;

(2) The name, address, business title, telephone number, facsimile number, electronic mail address and other contact information of the individual or individuals to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(A) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or a corporation;

(B) A partner or delegee, if the Licensee is a partnership; or

(C) An officer of the corporation, if the Licensee is a corporation;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or a corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence.

(g) **Distribution of payments.**

(1) The Designated Agents shall distribute royalty payments directly to Copyright Owners and Performers, according to 17 U.S.C. 114(g)(2); Provided that the Designated Agent shall only be responsible for making distributions to those Copyright Owners and Performers who provide the Designated Agents with such information as is necessary to identify and pay the correct recipient of such payments. The Designated ~~A~~agents shall distribute royalty payments on a basis that values all performances by a Licensee equally based upon the information provided by the Licensee pursuant to the regulations governing records of use of sound recordings by Licensees; Provided, however, Performers and Copyright Owners that authorize a particular~~the~~ Designated Agent may agree with the Designated Agent to allocate their shares of the royalty payments made by any Licensee among themselves on an alternative basis. Parties entitled to receive payments under 17 U.S.C. 114(g)(2) may agree with a~~the~~ Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties consistent with the percentages in 114(g)(2). In the event that a Performer does not designate an agent for collection of royalties, the Performers share of royalties shall be allocated to the Designated Agent of the Copyright owner which shall distribute royalties to the Performer consistent with this section.

(2) A~~The~~ Designated Agent shall inform the Register of Copyrights of:

(A) its methodology for distributing royalty payments to Copyright Owners and Performers who have not themselves authorized the Designated Agent (hereinafter "nonmembers"), and any amendments thereto, within 60 days of adoption and no later than 30 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(B) any written complaint that the Designated Agent receives from a nonmember concerning the distribution of royalty payments, within 60 days of receiving such written complaint; and

(C) the final disposition by the Designated Agent of any complaint specified by § 262.4(g)(2)(B), within 60 days of such disposition.

(3) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Designated Agent's methodology for distributing royalty payments to nonmembers meets the requirements of this section.

(h) **Permitted deductions.** ~~A~~The Designated Agent may deduct from the payments made by Licensees under § 262.3, prior to the distribution of such payments to any person or entity entitled thereto, all incurred costs permitted to be deducted under 17 U.S.C. 114(g)(3); Provided, however, that any party entitled to receive royalty payments under 17 U.S.C. 112(e) or 114(g) may agree to permit ~~the~~a Designated Agent to make any other deductions.

(i) **Retention of records.** Books and records of a Licensee and of the Designated Agent relating to the payment, collection, and distribution of royalty payments shall be kept for a period of not less than three (3) years.

**§ 262.5 Confidential information.**

(a) **Definition.** For purposes of this part, "Confidential Information" shall include the statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) **Exclusion.** Confidential Information shall not include documents or information that at the time of delivery to the Escrow~~Receiving~~ Agent or a Designated Agent are public knowledge. ~~A~~The Designated Agent that claims the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) **Use of Confidential Information.** In no event shall ~~a~~the Designated Agent use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; Provided, however, that ~~a~~the Designated Agent may disclose to Copyright Owners and Performers Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any individual Licensee cannot readily be

identified, and the Designated Agent may disclose the identities of services that have obtained licenses under section 112(e) or 114 and whether or not such services are current in their obligations to pay minimum fees and submit statements of account (so long as the Designated Agent does not disclose the amounts paid by the Licensee).

(d) **Disclosure of Confidential Information.** Except as provided in § 262.5(c) and as required by law, access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of their work, require access to the records;

(2) An independent and qualified auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Designated Agent with respect to the verification of a Licensee's statement of account pursuant to § 262.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty payments pursuant to § 262.7;

(3) The Copyright Office, in response to inquiries concerning the operation of the Designated Agent;

(4) In connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. 114(f)(2) and 112(e), and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and

(5) In connection with bona fide royalty disputes or claims that are the subject of the procedures under § 262.6 or 262.7 hereof, and under an appropriate confidentiality agreement or protective order, the specific parties to such disputes or claims, their attorneys, consultants or other authorized agents, and/or arbitration panels or the courts to which disputes or claims may be submitted.

(e) **Safeguarding of Confidential Information.** ~~A~~The Designated Agent and any person identified in § 262.5(d) shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to such Designated Agent or person.

**§ 262.6 Verification of Statements of Account.**

(a) **General.** This section prescribes procedures by which ~~a~~the Designated Agent may verify the royalty payments made by a Licensee.

(b) **Frequency of verification**. A~~The~~ Designated Agent may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three calendar years, but no calendar year shall be subject to audit more than once.

(c) **Notice of intent to audit**. A~~The~~ Designated Agent must file with the Copyright Office a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all parties participating in the audit.

(d) **Acquisition and retention of records**. The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three years. The Designated Agent shall retain the report of the verification for a period of not less than three years.

(e) **Acceptable verification procedure**. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all parties participating in the audit with respect to the information that is within the scope of the audit.

(f) **Consultation**. Before rendering a written report to the Designated Agent, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) **Costs of the verification procedure**. A~~The~~ Designated Agent shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

**§ 262.7 Verification of Royalty Payments.**

(a) **General**. This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty payments made by a~~the~~ Designated Agent; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or a Performer and the Designated Agent have agreed as to proper verification methods.

(b) **Frequency of verification**. A Copyright Owner or a Performer may conduct a single audit of ~~a~~the Designated Agent upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three calendar years, but no calendar year shall be subject to audit more than once.

(c) **Notice of intent to audit**. A Copyright Owner or Performer must file with the Copyright Office a notice of intent to audit the Designated Agent, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Designated Agent. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding only on those ~~all~~ Copyright Owners and Performers participating in the audit.

(d) **Acquisition and retention of records**. The Designated Agent shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three years. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than three years.

(e) **Acceptable verification procedure**. An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all parties participating in the audit with respect to the information that is within the scope of the audit.

(f) **Consultation**. Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Designated Agent in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Designated Agent reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) **Costs of the verification procedure**. The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Designated Agent shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

**§ 262.8 Unclaimed funds.**

If a Designated Agent is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, the Designated Agent shall retain the required payment in a segregated trust account for a period of three years from

the date of payment. No claim to such payment shall be valid after the expiration of the three year period. After the expiration of this period, the Designated Agent may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any state.

## CERTIFICATE OF SERVICE

I hereby certify that on the 5 th of June, 2003, a true and accurate copy of the foregoing document was served by overnight express mail on the following persons:

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By:

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**Before the**
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**LIBRARY OF CONGRESS**
**Washington, D.C.**

| | | |
|---|---|---|
| In the Matter of | ) | |
| Digital Performance Right in Sound Recordings Rate Adjustment | ) | Docket No. 2002-1 CARP DSTRA 3<br>2000-2 CARP DTNSRA |

**COMMENTS OF ROYALTY LOGIC, INC.**
**OBJECTING TO PROPOSED TERMS**

Pursuant to the Notice of Proposed Rulemaking in the above-captioned proceeding, published at 68 Fed. Reg. 27506 (May 20, 2003), Royalty Logic, Inc. ("RLI") files hereby its objections to those terms of the proposed regulations that relate to the Designated Agent and certain other administrative terms. RLI raises no objection to the rates agreed to by the parties. Specifically, RLI objects to proposed regulations contained in PART 262 that would have the anti-competitive effect of eliminating the only other agent designated to compete with RIAA/SoundExchange in offering critical statutory royalty collection and distribution services to copyright owners and performers. The regulations would deny to RLI a continuation of its designation pursuant to the previous webcasting CARP and thereby deny to RLI's copyright owner and performer affiliates their right, pursuant to 17 U.S.C §112(e)(2), §114(e)(1-2) and §114(g)(3), to the common agent of their choosing.

RLI filed the appropriate Notice of Intent to participate in the industry-wide voluntary negotiations leading up to the proposed regulations. However, RIAA/SoundExchange has utilized its market power to force the services into exclusive "one agent only" agreements

("characterized" by the RIAA as being voluntary[1]) that eliminate RLI as a competitive Designated Agent. These "one agent only" agreements are intended to deny choice and self-determination to performers and copyright owners who would never, unless forced, elect to be represented by RIAA/SoundExchange. If the Copyright Office does not authorize a CARP for the purpose of fully designating RLI as a "Designated Agent" under these circumstances, then participation in the industry-wide voluntary negotiation process is meaningless.

RLI's alternative proposed regulations are submitted herewith at Appendix A. Also submitted herewith is a Notice of Intent to Participate in any arbitration in this proceeding with respect to designation of, and the terms and regulations applicable to the Designated Agents.

## I. Background of RLI and its Interest in This Proceeding.

RLI is a for-profit corporation with its principal place of business in Burbank, California. RLI was appointed by the Librarian of Congress as one of two Designated Agents for the distribution of royalties paid under the Section 114 statutory license for the digital transmission of sound recordings by Eligible Nonsubscription Services. *Determination of*

[1] RLI believes that the so-called "voluntary" agreements have been made contingent on the services agreeing to RIAA/SoundExchange being the sole Designated Agent. It is, therefore, a gross mis-characterization for these "one agent only" agreements to be called fully voluntary – and, accordingly, the assent of the services paying the royalties should be given little weight. Furthermore, the services have no meaningful economic interest in whether RIAA/SoundExchange is the exclusive or nonexclusive Designated Agent, inasmuch as such designation does not affect the amount of their payments nor the administrative burden of making the payments. On the other hand, the opposition of RLI and its affiliated clients represent compelling interests against the proposed settlement which would make collection of royalties through RIAA/SoundExchange "in-voluntary" and "compulsory" on those copyright owners and performers who have interests, goals, business and cost recoupment strategies that diverge from the RIAA and their member record labels.

*Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule*, 67 Fed. Reg. 45239 (July 8, 2002) (the "Webcaster Decision"); 37 C.F.R. §261.4(b). RLI's business objective is to provide broad "common agent" services, as specifically authorized pursuant to 17 U.S.C §112(e)(2) and§114(e)(1-2) to sound recording copyright owners and performing artists with respect to the administration and distribution of royalty payments to be made to them pursuant to both voluntary and statutory licenses.

In order to provide these services at the lowest cost during the period when the business of digital transmission services is developing, RLI has entered into a long-term database, data processing and systems management agreement with Music Reports, Inc.[2]

RLI currently represents numerous copyright owners and performers whose works and performances have been performed by all statutory licensees including the pre-existing subscription services, satellite digital audio radio services and eligible nonsubscription and subscription webcast services.[3] RLI secures a broad right of representation across all Section 112 and 114 voluntary and statutory licenses such that RLI is authorized to collect and

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[2] Since 1989, Music Reports, Inc. has been making a market in music licensing transactions and providing data, systems and management expertise to administer high volume-low dollar music licensing transactions with respect to the public performances and reproductions of musical works on radio, television, cable and satellite broadcasting, and cable and satellite subscription music services. MRI currently administers more than $50 million in music licensing royalties annually, on behalf of record companies, digital distribution services and broadcasters in the U.S.

[3] RLI affiliates include copyright owners of recorded performances by Billboard-charted performers such as Coolio, Bobby Womack, David Was, Ray Charles, Burl Ives, Little Richard, Jimi Hendrix, Patsy Cline, Billie Holiday, Ella Fitzgerald, The Ink Spots, The Mills Brothers, Sarah Vaughn, Ricky Bell, Junior Reed, Black Uhuru, Taj Mahal, Motorhead, Dee Dee Ramone, Maxi Priest, Kurupt, Biohazard, etc.

distribute statutory license royalties and administer voluntary license transactions between individual copyright owners and transmissions services.

By affiliating with RLI and electing to receive their royalties from an agent other than RIAA/SoundExchange, RLI's performer and copyright owner affiliates are expressing their opposition, through RLI, to the proposed settlement, and are affirmatively exercising their right under 17 U.S.C. §114(g)(3), across all statutory licenses, to prevent a diminution of their royalties as a result of recoupment of unauthorized costs by RIAA/SoundExchange. Congress clearly expressed its intent by providing, in Section 114(g)(3), an exemption from RIAA cost recoupment such that copyright owners and performers choosing "another Designated Agent" would not be required to shoulder RIAA/SoundExchange's litigation costs and expenses against their will.[4] But copyright owners and performers can opt out of those confiscatory burdens only if the regulations designate an alternative agent to SoundExchange. Thus, the proposed "one agent only" regulations are in direct conflict with the "two agent" intent of Congress. RLI respectfully submits that approval of the proposed settlement would thwart the intent of Congress and the rights and interests of copyright owners and performers.

Copyright Owners and Performers who are party to the proposed settlement (i.e., those represented by RIAA/SoundExchange, The American Federation of Musicians and The American Federation of Television and Radio Artists) do not represent the will of all copyright owners and performers entitled to receive royalties. RLI must be designated to

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[4] New Section 114(g)(3) provides: A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto **other than copyright owners and performers who have elected to receive royalties from**

Footnote continued on next page

collect and distribute all statutory royalties, otherwise, the statutory rights of RLI-affiliated copyright owners and performers will be eviscerated by the settlement proposed by RIAA/SoundExchange.

Moreover, if the Copyright Office permits RIAA/SoundExchange, through private agreement, to negate the statutory rights of copyright owners and performers who do not wish to affiliate with RIAA/SoundExchange for the distribution of their performance royalties, then nothing will stop RIAA/SoundExchange from insisting on the elimination of RLI as a Designated Agent in every future settlement of a CARP proceeding. As a result, RLI copyright owners and performers would be compelled against their will to subsidize activities of RIAA/SoundExchange that they never had an opportunity to approve or influence and with which they may substantively disagree, and which subsidies could consume substantial portions of their performance royalties due to the imposition of historical litigation and other costs that RIAA/SoundExchange is seeking to impose on RLI affiliates.

In prior proceedings, the Copyright Office defined what it means to be an "interested party" for purposes of participating in a CARP proceeding. Having an interest in a CARP proceeding "suggests that a participant must be a party directly affected by the royalty fee, e.g., as a copyright owner, a copyright user, or an entity or organization involved in the collection and distribution of royalties." Order, *In the Matter of Digital Performance Right in Sound Recordings and Ephemeral Recordings*, Dkt. No. 99-6 CARP DTRA (June 21, 2000).

Thus, in light of the prior decisions of the Copyright Office and as an entity that distributes royalties, RLI has a stake in the proceeding and meets the definition of an

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Footnote continued from previous page
**another Designated Agent and have notified such nonprofit agent in writing of such**
Footnote continued on next page

"interested party" for purposes of this proceeding. Moreover, RLI is objecting to proposed terms, which would have the significant effect of eliminating RLI as a Designated Agent. Therefore, contrary to previous assertions of the RIAA, RLI is an interested party with much more than a *de minimus* interest.

**II. The Small Webcaster Settlement Act of 2002 ("SWSA") supercedes the regulatory requirement of "prior designation" by CARP or voluntary agreement contained in 37 C.F.R. §201.37(b)(1). Therefore, RLI may provide full common agent services to copyright owners and performers and may collect statutory license fees directly from licensees in connection with all statutory licenses.**

Sections 112(e)(2)[5] and 114(e)(1-2)[6] of the U.S. Copyright Law give copyright owners the right to designate common agents for the purpose of administering both voluntary and statutory licensing transactions - without limitation or any requirement of prior governmental

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**election**, the reasonable costs of such agent...

[5] §112(e)(2) "...any copyright owners of sound recordings...may designate common agents to negotiate, agree to, pay, or receive...royalty payments."

[6] §114(e)(1) "...in negotiating statutory licenses in accordance with subsection (f), ***any copyright owners of sound recordings*** and any entities performing sound recordings affected by this section may negotiate and agree upon the royalty rates and license terms and conditions for the performance of such sound recordings and the proportionate division of fees paid among copyright owners, and ***may designate common agents on a nonexclusive basis to negotiate, agree to, pay, or receive payments."***

§114(e)(2) "For licenses...other than statutory licenses...copyright owners of sound recordings affected by this section may designate common agents to act on their behalf to grant licenses and receive and remit royalty payments:..."

[7] As the Panel acknowledged, "Copyright owners *and performers,* on the other hand, have a direct and vital interest in who distributes royalties to them and how that entity operates" Report at 132 (emphasis added). The Register agrees. It was arbitrary to permit Copyright Owners to make an election that Performers are not permitted to make. The Register can conceive of no reason why Performers should not be given the same choice. Accordingly, the

or regulatory designation. The statute clearly makes "designation" the choice of the copyright owner. Further, in the previous Webcasting CARP the Librarian of Congress extended to featured performers, as well, the right to choose the agent that will represent them[7]. That choice is meaningless if there is only one agent.

However, Copyright Office regulations, dating back to the first pre-existing services CARP,[8] take the choice away from the copyright owner and place it in a regulatory process. The regulatory process defies rationality when it is interpreted to require a competitive agent, already designated in one regulatory proceeding, to obtain "designated" agent status in each and every regulatory proceeding (a process that could take years) before it can offer and continue to offer the full statutory license collection and distribution services contemplated by the statute and demanded by its affiliates.

RLI contends that this cumbersome multi-year "designation" process, serving no useful policy goal, has been superceded by enactment of the SWSA. Congress gave RIAA/SoundExchange the right to deduct certain costs, however, new section 114(g)(3) contains an important exemption:

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Register recommends that § 261.4 be amended to provide that a Copyright Owner or a Performer may make such an election. *See* § 261.4(c) of the recommended regulatory text. *Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings and Ephemeral Recordings; Final Rule*, 67 Fed. Reg. 45239 (July 8, 2002) (the "Webcaster Decision")

[8] 37 C.F.R. §201.37(b)(1) provides "A Collective is a collection and distribution organization that is designated under the statutory license, either by settlement agreement reached under section 114(f)(1)(A) or section 114(f)(1)(C)(i) and adopted pursuant to 37 CFR 251.63(b), or by decision of a Copyright Arbitration Royalty Panel (CARP) under section 114(f)(1)(B) or section 114(f)(1)(C)(ii), or by an order of the Librarian pursuant to 17 U.S.C. 802(f)."

> "A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto **other than copyright owners and performers who have elected to receive royalties from another Designated Agent and have notified such nonprofit agent in writing of such election**, the reasonable costs of such agent..."

As §114(g)(3) makes clear, Congress codified the right to choose among competing agents, and provided that both performers and copyright owners have the absolute right to choose a Designated Agent other than RIAA/SoundExchange so as to avoid the recoupment of historical litigation and other costs.[9] Notably, 114(g)(3) applies to all transmission services operating pursuant to statutory licenses (i.e., pre-existing subscription, eligible non-subscription, etc.). Therefore, if RIAA/SoundExchange can recoup costs against receipts from all statutory licensees – then, the choice of agents and the exemption for the purpose of avoiding cost recoupment (i.e., through affiliation with "another Designated Agent") must also apply to receipts from all statutory licensees. Accordingly, the effect of 114(g)(3) is to fully authorize RLI to collect and distribute receipts from all statutory licenses and licensees without need for further regulatory designation. Moreover, the SWSA exemption (i.e., barring cost recoupment through affiliation with another agent) is a statutory right of copyright owners and performers. RIAA cannot avoid this reality by eliminating RLI's designation, obtained through the CARP process, with the device of a "claimed" industry-wide voluntary settlement ignoring that statutory right,

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[9] The RIAA has previously characterized RLI and its affiliates as "free riders" because they have not shared the costs of establishing statutory license fees. However, RLI and its affiliates had little or no meaningful opportunity to influence those in the driver's seat. RIAA made this argument to Congress prior to passage of the SWSA. Congress already considered the argument, and rejected it. RIAA/SoundExchange should not now be permitted to obtain through the back door what Congress determined not to give them at all.

Therefore, only two conclusions are possible after enactment of the SWSA. Either any party can function as a Designated Agent (on choice of the copyright owner), or the two CARP authorized agents in existence at the time of enactment must be fully and equally designated to perform all collection and distribution functions. The proposed regulations in this proceeding must be modified accordingly. Further, 37 C.F.R. §201.37(b)(1) should either be deleted entirely or modified by addition of the following sentence:

> "A Collective, once designated, may collect license fees payable pursuant to all section 112(e) and 114(f) statutory licenses directly from statutory licensees (unless such Collective agrees to allow statutory licensees to make payment to an independent escrow agent for further allocation and distribution to all Collectives) and distribute such royalties to copyright owners and performers."

**III. If "designation" should still be required, the CARP must once and for all designate RLI to collect and distribute all §112 and §114 statutory license fees collected from all transmission services.**

RLI, having been authorized in the previous Webcasting CARP to offer competitive services and effectuate the choice guaranteed to performers and copyright owners, must be entitled to operate across all statutory licenses for the benefit of its members and be able to continue to do so. The RIAA (a trade association representing the major record labels), in lock step[10] with the American Federation of Musicians and the American Federation of Television and Radio Artists (the unions representing background singers and musicians), should not be allowed to unilaterally eliminate designated competition solely by entering into anti-competitive agreements and forcing RLI into expensive litigation just to survive.

Failure to designate RLI as a Designated Agent will force many performers and copyright owners, against their will, to receive the statutory portion of their royalties through

RIAA/SoundExchange or, in the event of the demise of RIAA/SoundExchange (as apparently contemplated by the proposed regulations)[11] some other unknown or unproven agent (perhaps owned by the RIAA, the major labels AFTRA, AFM, etc.). No law or regulation should force RLI affiliates to receive royalties from an entity that they did not choose.

## IV. RLI's designation will foster the availability of new music to transmission services and provide efficiencies for copyright owners and performers.

Digital transmission services hold the promise of making vast amounts of music available to the public – including genres and artists left behind by traditional radio and the major record labels and distributors (e.g., unsigned performers, artists who have been dropped from their major label deals, etc.). Digital transmission technologies (webcasting, subscription services, etc.) create more channels and opportunities for artists to exercise self determination, reach an audience and develop a relationship with the public – bypassing the major record label distributors and the traditional radio gatekeepers.

Section 114, as amended, recognizes this democratization of digital music distribution and creates a performance right for the digital transmission of sound recordings. It contemplates both statutory licenses and the ability of individual copyright owners and transmission services to enter into direct voluntary licenses that take precedence over

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Footnote continued from previous page

[10] Please refer to the Comments of the AFM and AFTRA objecting to the Supplemental Comments of RLI in the pending pre-existing subscription services proceeding.

[11] §262.4 provides "If SoundExchange should fail to incorporate by July 1, 2003, dissolve or cease to be governed by a board consisting of equal number of representatives of Performers and Copyright Owners, then it *shall be replaced by successor entities* upon...(A)...majority vote of the nine copyright owner representatives on the SoundExchange Board...(B)...majority vote of the nine performer representatives on the SoundExchange Board....

statutory license terms. Indeed, §262.1(c) of the proposed regulations specifically provides for voluntary licenses to take precedence over statutory licenses.[12] In practice, for example, a new artist may wish to grant a license at a reduced rate or waive the play list restrictions of the statutory license in exchange for promotional benefits. Indeed, for new artists the ability to enter into such voluntary transactions is a way to get exposure outside the traditional radio airplay system.

Copyright owners and performers have chosen to affiliate with RLI because they seek to be represented by a single independent administrator that can 1) license and collect royalties from voluntary licenses that authorize the promotion, transmission and distribution of recordings, and 2) collect and distribute royalties from transmissions authorized pursuant to all of the statutory licenses and 3) enable their own competition with the major labels.

If RLI is not designated to collect and distribute all royalties, the administration of their royalties will become fragmented and they will be forced to use multiple agents creating an expensive and burdensome record keeping nightmare. Practically, RLI affiliates would have to send information on past, current and future catalog sound recordings and performances to multiple agents. In addition, they would be forced to send payment information to multiple agents, provide tax information to multiple agents, monitor the timing and accuracy of payments received from multiple agents and perform audits on multiple agents. Collecting all of their royalties through a single administrator of their choosing for all

[12] §262.1(c) **Relationship to voluntary agreements.** Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services shall apply in lieu of the rates and terms of this part to transmissions within the scope of such agreements.

their §114 royalties is the best way for them to insure the prompt, efficient and fair payment of royalties with a minimum of expense.

## V. Multiple Agents have Proven Beneficial and Desirable in Other Compulsory and Music Licensing Contexts.

Provisions of existing statutory licenses applicable to music copyrights (*e.g.*, Sections 112(e)(2), 114(e)(1-2), 115(c)(3)(B) and 116(b)(2)) are consistent in providing that copyright owners "...may designate common agents to negotiate, agree to, pay or receive royalty payments." Multiple common agents, chosen at the discretion of the copyright owner, function in the administration of the section 115 statutory license (*e.g.*, Harry Fox Agency, MCS Music America, Inc., Bug Music, Wixen Music Publishing, Inc., Mizmo Enterprises, etc.) without any Copyright Office regulation or oversight as to who may function in that capacity, when such common agents may commence operation or how they operate. Other copyright owners administer these rights themselves or through their lawyers. In the context of the performance of musical works, there are three well-established agents representing songwriters and music publishers, ASCAP, BMI and SESAC. At one time BMI (an entity owned by broadcasters) represented only a few gospel and country writers and publishers. Now, BMI represents approximately the same market share as ASCAP, and the membership rolls of SESAC continue to grow as well.

RLI respectfully submits that such related experience in the music industry suggests that copyright owners and performers also will desire, and benefit from, having a competitive choice among agents for the distribution of sound recording performance royalties. Multiple agents will compete for clients based upon the benefits each offers to its respective members. Such benefits may take the form of lower administration costs, more flexible terms, more

frequent payments, greater transparency in operation, better access to information, and other terms that confer potential benefits upon the membership. Thus, giving a choice to copyright owners and performers will stimulate each agent to offer better service and better terms, and thereby promote the purposes and the benefits of the statutory license.

## VI. RLI's Designation Will Deliver to its Client Copyright Owners and Performers the Benefits Congress Intended to Confer Upon Them through the SWSA.

By enacting the SWSA, Congress permitted a non-profit agent (i.e., RIAA/SoundExchange) to deduct particular costs from royalties to be distributed under the statutory license, with a specific exception that is directly relevant here. New Section 114(g)(3)[13], reflects two important policies relevant to this proceeding. First, Congress acknowledged and contemplated that more than one entity could serve as a Designated Agent in competition with SoundExchange. Thus, Congress acknowledged implicitly the benefits of competition among agents that administer the royalties. Second, while Congress acceded to SoundExchange's request to deduct CARP and other costs from the royalties payable to SoundExchange members, Congress specifically prohibited SoundExchange from deducting royalties payable to clients of competing agents. Thus, Congress codified the right to choose among competing agents, and provided that performers and copyright owners have the absolute right to choose a Designated Agent other than SoundExchange so as to avoid the recoupment of historical litigation and other costs.

[13] Section 114(g)(3) is repeated here for emphasis: "A nonprofit agent designated to distribute receipts from the licensing of transmissions in accordance with subsection (f) may deduct from any of its receipts, prior to the distribution of such receipts to any person or entity entitled thereto **other than copyright owners and performers who have elected to receive royalties from another Designated Agent and have notified such nonprofit agent in writing of such election**, the reasonable costs of such agent..."

As noted previously, RLI believes that the so-called "voluntary" agreements have been made contingent on the services agreeing to RIAA/SoundExchange being the sole Designated Agent. RLI respectfully submits that it would be extraordinary and inappropriate for private parties to thus thwart the will of Congress by eliminating, by private agreement, the sole competitor to SoundExchange that Congress assured would not be saddled with expenses that neither it nor its clients incurred. Indeed, section 114(g)(3), and in particular the language in footnote 13 highlighted in bold, was amended by Congress following introduction of the bill, specifically to protect the interests of non-SoundExchange-member copyright owners and performers.

If the interests of copyright owners and performers are to be protected and served, as Congress intended, then they deserve as an alternative to SoundExchange a financially-sound competitor that can administer all royalty payments across all statutory licenses. RLI is ready to be that competitor.

## VII. RLI objects to the concept of the "receiving agent" and more importantly to the concept that the "receiving agent" and a "Designated Agent" can be the same party.

The regulations that require all licensees to pay one entity called the "receiving agent" and also allow RIAA/SoundExchange to be both the receiving agent and a Designated Agent create an inherently suspicious situation - rife with the possibility of co-mingling of funds - as there is insufficient control over the acts of the receiving agent. For example, there is no requirement that the receiving agent hold monies in a separate, interest bearing account. Nothing appears to prohibit the receiving agent that is also a Designated Agent from utilizing the funds in any manner for its own purposes prior to allocation to the Designated Agents. For example, a receiving agent that is also a Designated Agent could delay allocation of

receipts among Designated Agents, control the cash flow and create a pool of money from which to offer advances that a competing Designated Agent could not offer.

Instead, to prevent such abuse, the regulations should provide that license fees be paid either directly to the Designated Agents[14] or, in the alternative, to an independent escrow agent established, controlled and maintained jointly by the Designated Agents, which holds license fees in trust in separate/segregated interest bearing accounts pending pro-rata allocation among the Designated Agents on mutual agreement of the Designated Agents. License receipts paid to an independent escrow agent, would be apportioned on a reasonable basis valuing all performances equally using a methodology which is agreed upon among the agents. Escrow and allocation costs would be shared on a pro rata basis.[15] The regulations must create a level playing field among the Designated Agents with each agent entitled to receive the same information from licensees (i.e., Notice of Intent to utilize the statutory license, monthly statement of account and monthly records of use of sound recordings). As long as a level playing field is maintained among the Designated Agents with mutual right to approve the ground rules for the independent escrow agent then copyright owners and performers could look to their Designated Agent to protect their interests.

RLI believes that the proven way to provide administrative efficiencies, minimize transaction costs and maximize distributions to copyright owners and performers is to enable a competitive market place in which in which license fees are paid to an independent escrow

[14] The Designated Agents could post on their websites a list of their copyright owner and performer affiliates so that Licensees could determine the amount of the royalty payments due each Designated Agent.

[15] The Copyright Office should take notice of the fact that many of these controls were first established in the previous Webcasting CARP. Indeed, the proposed regulations would also apply these principals in a two agent scenario but only where RLI has first been eliminated and the two agents are exclusively successor entities of RIAA/SoundExchange.

agent mutually controlled by the Designated Agents and in which Designated Agents compete for the representation of copyright owners and performers on price (i.e., administrative fees and costs), terms and available services.

**VIII. RLI objects to the regulations providing for the break-up of SoundExchange.**

It is plain from the terms of Section 262.4(b)(2)[16] of the proposed regulations that the major label copyright owners, AFM and AFTRA having among themselves attempted to prevent the RLI designation, are already planning for the demise of SoundExchange without having to also deal with marketplace competition from RLI.

On its demise, two entities would be formed, one by the major label members of the SoundExchange board and one by the "performer" members of the board. If RLI is not designated, RLI members would be forced on the demise of SoundExchange to receive their royalties through some as yet unnamed and unproven successor agents perhaps owned by the major labels, perhaps owned by AFM/AFTRA. It would be grossly unfair for the successor entities to be able to divide among themselves the representation of featured performers and copyright owners (as provided for in the proposed regulations)[17] without approval and without any oversight as to the capability of the successor entities to administer such royalties.

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[16] §262.4 provides "If SoundExchange should fail to incorporate by July 1, 2003, dissolve or cease to be governed by a board consisting of equal number of representatives of Performers and Copyright Owners, then it *shall be replaced by successor entities* upon...(A)...majority vote of the nine copyright owner representatives on the SoundExchange Board...(B)...majority vote of the nine performer representatives on the SoundExchange Board...."

Footnote continued on next page

If the parties currently controlling SoundExchange (the same parties seeking to deny RLI its full designation) can only resolve their internal issues by separating into two successor entities, the successor entities should be subject to the same designation requirements they seek to place on RLI. In other words, after dissolution, they should be required to again seek Designated Agent status in each and every statutory license negotiation/CARP (however many years that may take) prior to commencing operations. They cannot get a "free pass" to full, equal and instant designation on a contingency, without having to first prove their capacity to perform the collection and distribution functions. Therefore, the provisions relating to the demise of SoundExchange should be deleted.

## IX. Conclusion

For the reasons set forth above, on behalf of its affiliates and itself, RLI respectfully objects to the proposed regulations. For the convenience of the parties, and in the hope that constructive dialogue among the parties may yet avoid a CARP proceeding, RLI attaches hereto as Appendix A proposed alternative regulations that would provide for multiple Designated Agents and other administrative issues.

Pursuant to the Notice of Proposed Rulemaking, and out of an abundance of caution, RLI submits herewith a Notice of Intent to Participate in any arbitration in this proceeding.

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Footnote continued from previous page
[17] Section 262.4(b)(3)(D) provides "The Designated Agents shall agree between themselves concerning responsibility for distributing royalty payments to Copyright Owners and Performers that have not themselves authorized either Designated Agent."

Respectfully submitted,

Date: June 5, 2003

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**Before the**
**LIBRARY OF CONGRESS**
**UNITED STATES COPYRIGHT OFFICE**
**Washington, D.C.**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Digital Performance Right in | ) | Docket No. 2002-1 CARP DSTRA 3 |
| Sound Recordings | ) | 2000-2 CARP DTNSRA |
| Rate Adjustment | ) | |
| | ) | |

## NOTICE OF INTENT TO PARTICIPATE


Name: **Royalty Logic, Inc.**

Address: 405 Riverside Drive
Burbank, CA 91506

Telephone: 818-558-1400

Facsimile: 818-558-3484

Contact: Ronald Gertz


Royalty Logic, Inc. ("RLI"), pursuant to 17 U.S.C. § 801, the Notice of Proposed Rulemaking published by the Copyright Office at 68 Fed. Reg. 27506 (May 20, 2003), and Part 251 of the Rules of the Copyright Office, 37 C.F.R. § 251, hereby submits its Notice of Intent to Participate in the above-captioned proceedings of the Copyright Arbitration Royalty Panel ("CARP") to determine certain terms of the statutory licenses for the performance of sound recordings under 17 U.S.C. § 114, and for the making by them of ephemeral recordings under 17 U.S.C. § 112(e). RLI has been approved by the Librarian, in Docket No. 2000-9 CARP DTRA 1&2, as a Designated Agent for the distribution of sound recording performance and multiple ephemeral recording royalty payments made by eligible nonsubscription services. 37 C.F.R. § 261.4(b) (2002). RLI wishes to participate in this proceeding solely with respect to the

designation of Designated Agent(s), and all terms and conditions of the licenses and any regulations relating to the pertaining to such agents.

Respectfully submitted,

Date: June 5, 2003

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**Exhibit A**
**RLI Proposed Regulations**

PART 262 – RATES AND TERMS FOR CERTAIN ELIGIBLE NONSUBSCRIPTION TRANSMISSIONS, NEW SUBSCRIPTION SERVICES AND THE MAKING OF EPHEMERAL REPRODUCTIONS

Sec.
262.1 General.
262.2 Definitions.
262.3 Royalty fees for public performance of sound recordings and for ephemeral recordings.
262.4 Terms for making payment of royalty fees and statements of account.
262.5 Confidential information.
262.6 Verification of statements of account.
262.7 Verification of royalty payments.
262.8 Unclaimed funds.

Authority: 17 U.S.C. 112(e), 114, 801(b)(1).

**§ 262.1 General.**

(a) **Scope.** This part 262 establishes rates and terms of royalty payments for the public performance of sound recordings in certain digital transmissions by certain Licensees in accordance with the provisions of 17 U.S.C. 114, and the making of Ephemeral Recordings by certain Licensees in accordance with the provisions of 17 U.S.C. 112(e), during the period 2003-2004 and in the case of Subscription Services 1998-2004 (the "License Period").

(b) **Legal compliance.** Licensees relying upon the statutory licenses set forth in 17 U.S.C. 112 and 114 shall comply with the requirements of those sections, the rates and terms of this part and any other applicable regulations.

(c) **Relationship to voluntary agreements.** Notwithstanding the royalty rates and terms established in this part, the rates and terms of any license agreements entered into by Copyright Owners and services shall apply in lieu of the rates and terms of this part to transmissions within the scope of such agreements.

**§ 262.2 Definitions.**

For purposes of this part, the following definitions shall apply:

(a) **Aggregate Tuning Hours** means the total hours of programming that the Licensee has transmitted during the relevant period to all Listeners within the United States from all channels and stations that provide audio programming consisting, in whole or in part, of eligible nonsubscription transmissions or noninteractive digital audio

transmissions as part of a new subscription service, less the actual running time of any sound recordings for which the Licensee has obtained direct licenses apart from 17 U.S.C. 114(d)(2) or which do not require a license under United States copyright law. By way of example, if a service transmitted one hour of programming to 10 simultaneous Listeners, the service's Aggregate Tuning Hours would equal 10. If three minutes of that hour consisted of transmission of a directly licensed recording, the service's Aggregate Tuning Hours would equal 9 hours and 30 minutes. As an additional example, if one Listener listened to a service for 10 hours (and none of the recordings transmitted during that time was directly licensed), the service's Aggregate Tuning Hours would equal 10.

(b) **Broadcast Simulcast** means (i) a simultaneous Internet transmission or retransmission of an over-the-air terrestrial AM or FM radio broadcast, including one with previously broadcast programming substituted for programming for which requisite licenses or clearances to transmit over the Internet have not been obtained and one with substitute advertisements, and (ii) an Internet transmission in accordance with 17 U.S.C. 114(d)(2)(C)(iii) of an archived program, which program was previously broadcast over-the-air by a terrestrial AM or FM broadcast radio station, in either case whether such Internet transmission or retransmission is made by the owner and operator of the AM or FM radio station that makes the broadcast or by a third party.

(c) **Business Establishment Service** means a service making transmissions of sound recordings under the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv).

(d) **Copyright Owner** is a sound recording copyright owner who is entitled to receive royalty payments made under this part pursuant to the statutory licenses under 17 U.S.C. 112(e) or 114.

(e) **Designated Agent** is ~~the agent designated by the Librarian of Congress as provided in § 262.4(b).~~an agent designated by the Librarian of Congress for the receipt of royalty payments made pursuant to this part. The Designated Agent shall make further distribution of those royalty payments to Copyright Owners and Performers as provided in §262.4(b)(1).

(f) **Ephemeral Recording** is a phonorecord created for the purpose of facilitating a transmission of a public performance of a sound recording under the limitations on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv) or for the purpose of facilitating a transmission of a public performance of a sound recording under a statutory license in accordance with 17 U.S.C. 114(f) , and subject to the limitations specified in 17 U.S.C. 112(e).

(g) **Escrow Agent** is the agent designated by mutual agreement of- the Designated Agents for the collection of royalty payments made pursuant to this part by Licensees and the distribution of those royalty payments to the Designated Agents.

(hg) **Licensee** is a person or entity that (i) has obtained a compulsory license under 17 U.S.C. 114 and the implementing regulations therefor to make eligible nonsubscription transmissions, or noninteractive digital audio transmissions as part of a new subscription service (as defined in 17 U.S.C. 114(j)(8)), or that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make Ephemeral Recordings for use in facilitating such transmissions, or (ii) is a Business Establishment Service that has obtained a compulsory license under 17 U.S.C. 112(e) and the implementing regulations therefor to make Ephemeral Recordings, but not a person or entity that:

(1) is exempt from taxation under section 501 of the Internal Revenue Code of 1986 (26 U.S.C. 501);

(2) has applied in good faith to the Internal Revenue Service for exemption from taxation under section 501 of the Internal Revenue Code and has a commercially reasonable expectation that such exemption shall be granted; or

(3) is a State or possession or any governmental entity or subordinate thereof, or the United States or District of Columbia, making transmissions for exclusively public purposes.

(ih) **Listener** is a player, receiving device or other point receiving and rendering a transmission of a public performance of a sound recording made by a Licensee, irrespective of the number of individuals present to hear the transmission.

(ji) **Nonsubscription Service** means a service making eligible nonsubscription transmissions.

(kj) **Performance** is each instance in which any portion of a sound recording is publicly performed to a Listener by means of a digital audio transmission or retransmission (e.g., the delivery of any portion of a single track from a compact disc to one Listener) but excluding the following:

(1) a performance of a sound recording that does not require a license (e.g., the sound recording is not copyrighted);

(2) a performance of a sound recording for which the service has previously obtained a license from the Copyright Owner of such sound recording; and

(3) an incidental performance that both: (i) makes no more than incidental use of sound recordings including, but not limited to, brief musical transitions in and out of commercials or program segments, brief performances during news, talk and sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events and (ii) other than ambient music that is background at a public event, does not contain an entire sound recording and does

not feature a particular sound recording of more than thirty seconds (as in the case of a sound recording used as a theme song).

(~~lk~~) **Performers** means the independent administrators identified in 17 U.S.C. 114(g)(2)(B) and (C) and the parties identified in 17 U.S.C. 114(g)(2)(D).

(~~ml~~) **Subscription Service** means a new subscription service (as defined in 17 U.S.C. 114(j)(8)) making noninteractive digital audio transmissions.

(~~nm~~) **Subscription Service Revenues** shall mean all monies and other consideration paid or payable, including the fair market value of non-cash or in-kind consideration paid or payable by third parties, from the operation of a Subscription Service, as comprised of the following:

(1) subscription fees and other monies and consideration paid for access to the Subscription Service by or on behalf of subscribers receiving within the United States transmissions made as part of the Subscription Service;

(2) monies and other consideration (including without limitation customer acquisition fees) from audio or visual advertising, promotions, sponsorships, time or space exclusively or predominantly targeted to subscribers of the Subscription Service, whether (i) on or through the Subscription Service media player, or on pages accessible only by subscribers or that are predominantly targeted to subscribers, or (ii) in e-mails addressed exclusively or predominantly to subscribers of the Subscription Service, or (iii) delivered exclusively or predominantly to subscribers of the Subscription Service in some other manner, in each case less advertising agency commissions (not to exceed 15% of those monies and other consideration) actually paid to a recognized advertising agency not owned or controlled by Licensee;

(3) monies and other consideration (including without limitation the proceeds of any revenue-sharing or commission arrangements with any fulfillment company or other third party, and any charge for shipping or handling) from the sale of any product or service directly through the Subscription Service media player or through pages or advertisements accessible only by subscribers or that are predominantly targeted to subscribers (but not pages or advertisements that are not predominantly targeted to subscribers), less (i) monies and other consideration from the sale of phonorecords and digital phonorecord deliveries of sound recordings, (ii) the Licensee's actual, out-of-pocket cost to purchase for resale the products or services (except phonorecords and digital phonorecord deliveries of sound recordings) from third parties, or in the case of products produced or services provided by the Licensee, the Licensee's actual cost to produce the product or provide the service (but not more than the fair market wholesale value of the product or service), and (iii) sales and use taxes, shipping, and credit card and fulfillment service fees actually paid to unrelated third parties; provided that: (A) the fact that a transaction is consummated on a different page than the page/location where a potential customer responds to a "buy button" or other purchase opportunity for a product or service advertised directly through such player, pages or advertisements shall not

render such purchase outside the scope of Subscription Service Revenues hereunder, and (B) monies and other consideration paid by or on behalf of subscribers for software or any other access device owned by Licensee (or any subsidiary or other affiliate of the Licensee, but excluding, for the avoidance of doubt, any entity that sells a third party product, whether or not bearing the Licensee's brand) to access the Licensee's Subscription Service shall not be deemed part of Subscription Service Revenues, unless such software or access device is required as a condition to access the Subscription Service and either is purchased by a subscriber contemporaneously with or after subscribing or has no independent function other than to access the Subscription Service;

(4) monies and other consideration for the use or exploitation of data specifically and separately concerning subscribers or the Subscription Service, but not monies and other consideration for the use or exploitation of data wherein information concerning subscribers or the Subscription Service is commingled with and not separated or distinguished from data that predominantly concern nonsubscribers or other services; and

(5) Bad debts recovered with respect to § 262.2(m)(1) through (4); provided that the Subscription Service shall be permitted to deduct bad debts actually written off during a reporting period.

**§ 262.3 Royalty fees for public performances of sound recordings and for ephemeral recordings.**

(a) **Basic royalty rate.** Royalty rates and fees for (i) eligible nonsubscription transmissions made by Licensees pursuant to 17 U.S.C. 114(d)(2) during the period January 1, 2003, through December 31, 2004, and the making of Ephemeral Recordings pursuant to 17 U.S.C. 112(e) to facilitate such transmissions, (ii) noninteractive digital audio transmissions made by Licensees pursuant to 17 U.S.C. 114(d)(2) as part of a new subscription service during the period October 28, 1998, through December 31, 2004, , and the making of Ephemeral Recordings pursuant to 17 U.S.C. 112(e) to facilitate such transmissions, and (iii) the making of Ephemeral Recordings by Business Establishment Services pursuant to 17 U.S.C. 112(e) during the period January 1, 2003, through December 31, 2004, shall be as follows:

(1) **Nonsubscription Services.** For their operation of Nonsubscription Services, Licensees other than Business Establishment Services shall, at their election as provided in § 262.3(b), pay at one of the following rates:

(A) **Per Performance Option.** $0.000762 (0.0762¢) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under section 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensees electing this

payment option irrespective of the Licensee's actual experience in respect of partial Performances.

(B) **Aggregate Tuning Hour Option.**

(i) **Non-Music Programming.** $0.000762 (0.0762¢) per Aggregate Tuning Hour for programming reasonably classified as news, talk, sports or business programming.

(ii) **Broadcast Simulcasts.** $0.0088 (0.88¢) per Aggregate Tuning Hour for Broadcast Simulcast programming not reasonably classified as news, talk, sports or business programming.

(iii) **Other Programming.** $0.0117 (1.17¢) per Aggregate Tuning Hour for programming other than Broadcast Simulcast programming and programming reasonably classified as news, talk, sports or business programming.

(2) **Subscription Services.** For their operation of Subscription Services, Licensees other than Business Establishment Services shall, at their election as provided in § 262.3(b), pay at one of the following rates:

(A) **Per Performance Option.** $0.000762 (0.0762¢) per Performance for all digital audio transmissions, except that 4% of Performances shall bear no royalty to approximate the number of partial Performances of nominal duration made by a Licensee due to, for example, technical interruptions, the closing down of a media player or channel switching; Provided that this provision is not intended to imply that permitting users of a service to "skip" a recording is or is not permitted under section 114(d)(2). For the avoidance of doubt, this 4% exclusion shall apply to all Licensees electing this payment option irrespective of the Licensee's actual experience in respect of partial performances.

(B) **Aggregate Tuning Hour Option.**

(i) **Non-Music Programming.** $0.000762 (0.0762¢) per Aggregate Tuning Hour for programming reasonably classified as news, talk, sports or business programming.

(ii) **Broadcast Simulcasts.** $0.0088 (0.88¢) per Aggregate Tuning Hour for Broadcast Simulcast programming not reasonably classified as news, talk, sports or business programming.

(iii) **Other Programming.** $0.0117 (1.17¢) per Aggregate Tuning Hour for programming other than Broadcast Simulcast programming and programming reasonably classified as news, talk, sports or business programming.

(C) **Percentage of Subscription Service Revenues Option.** 10.9% of Subscription Service Revenues, but in no event less than 27¢ per month for each person who subscribes to the Subscription Service for all or any part of the month or to whom the Subscription Service otherwise is delivered by Licensee without a fee (e.g., during a free trial period), subject to the following reduction associated with the transmission of directly licensed sound recordings (if applicable). For any given payment period, the fee due from Licensee shall be the amount calculated under the formula described in the immediately preceding sentence multiplied by the following fraction: the total number of Performances (as defined under § 262.2(j) hereof, which excludes directly licensed sound recordings) made by the Subscription Service during the period in question, divided by the total number of digital audio transmissions of sound recordings made by the Subscription Service during the period in question (inclusive of Performances and equivalent transmissions of directly licensed sound recordings). Any Licensee paying on such basis shall report to the Designated Agent on its statements of account the pertinent music use information upon which such reduction has been calculated. This option shall not be available to a Subscription Service where (i) a particular computer software product or other access device must be purchased for a separate fee from the Licensee as a condition of receiving transmissions of sound recordings through the Subscription Service, and the Licensee chooses not to include sales of such software product or other device to subscribers as part of Subscription Service Revenues in accordance with § 262.2(m)(3) hereof, or (ii) the consideration paid or given to receive the Subscription Service also entitles the subscriber to receive or have access to material, products or services other than the Subscription Service (for example, as in the case of a "bundled service" consisting of access to the Subscription Service and also access to the Internet in general). In all events, in order to be eligible for this payment option, a Licensee may not engage in pricing practices whereby the Subscription Service is offered to subscribers on a "loss leader" basis or whereby the price of the Subscription Service is materially subsidized by payments made by the subscribers for other products or services.

(3) **Business Establishment Services.** For the making of any number of Ephemeral Recordings in the operation of a service pursuant to the limitation on exclusive rights specified by 17 U.S.C. 114(d)(1)(C)(iv), a Licensee that is a Business Establishment Service shall pay 10% of such Licensee's "Gross Proceeds" derived from the use in such service of musical programs that are attributable to copyrighted recordings. "Gross Proceeds" as used in this § 262.3(a)(3) means all fees and payments, including those made in kind, received from any source before, during or after the License Period that are derived from the use of copyrighted sound recordings pursuant to 17 U.S.C. 112(e) for the sole purpose of facilitating a transmission to the public of a performance of a sound recording under the limitation on exclusive rights specified in 17 U.S.C. 114(d)(1)(C)(iv). The attribution of Gross Proceeds to copyrighted recordings may be made on the basis of: (A) for classical programs, the proportion that the playing time of copyrighted classical recordings bears to the total playing time of all classical recordings in the program, and (B) for all other programs, the proportion that the number of copyrighted recordings bears to the total number of all recordings in the program.

(b) **Election process.** A Licensee other than a Business Establishment Service shall elect the particular Nonsubscription Service and/or Subscription Service royalty rate categories it chooses (that is, among § 262.3(a)(1)(A) or (B) and/or § 262.3(a)(2)(A), (B) or (C)) for the License Period by no later than the date 30 days after these rates and terms are adopted by the Librarian of Congress and published in the Federal Register. Notwithstanding the preceding sentence, where a Licensee has not previously provided a Nonsubscription Service or Subscription Service, as the case may be, the Licensee may make its election by no later than thirty (30) days after the new service first makes a digital audio transmission of a sound recording under the section 114 statutory license. Each such election shall be made by notifying the Designated Agent(s) in writing of such election, using an election form provided by the Designated Agent(s). A Licensee that fails to make a timely election shall pay royalties as provided in § 262.3(a)(1)(A) and § 262.3(a)(2)(A), as applicable. Notwithstanding the foregoing, a Licensee eligible to make royalty payments under an agreement entered into pursuant to the Small Webcaster Settlement Act of 2002 may elect to make payments under such agreement as specified in such agreement.

(c) **Ephemeral Recordings.** The royalty payable under 17 U.S.C. 112(e) for any reproduction of a phonorecord made by a Licensee other than a Business Establishment Service during the License Period, and used solely by the Licensee to facilitate transmissions for which it pays royalties as and when provided in this section and § 262.4 shall be deemed to be included within, and to comprise 8.8% of, such royalty payments. The royalty payable under 17 U.S.C. 112(e) for the reproduction of phonorecords by a Business Establishment Service shall be as set forth in § 262.3(a)(3).

(d) **Minimum fee.**

(1) **Business Establishment Services.** Each Licensee that is a Business Establishment Service shall pay a minimum fee of $10,000 for each calendar year in which it makes Ephemeral Recordings for use to facilitate transmissions under the limitation on exclusive rights specified by section 114(d)(1)(C)(iv), whether or not it does so for all or any part of the year.

(2) **Other Services.** Each Licensee other than a Business Establishment Service shall pay a minimum fee of $2,500, or $500 per channel or station (excluding archived programs, but in no event less than $500 per Licensee), whichever is less, for each calendar year in which it makes eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings for use to facilitate such transmissions, whether or not it does the foregoing for all or any part of the year; except that the minimum annual fee for a Licensee electing to pay under § 262.3(a)(2)(C) hereof shall be $5,000.

(3) **In General.** These minimum fees shall be nonrefundable, but shall be fully creditable to royalty payments due under § 262.3(a) for the same calendar year (but not any subsequent calendar year).

(e) **Continuing Obligation.** For the limited purpose of the period immediately following the License Period, and on an entirely without prejudice and nonprecedential basis relative to other time periods and proceedings, if successor statutory royalty rates for Licensees for the period beginning January 1, 2005 have not been established by January 1, 2005, then Licensees shall pay to the Designated Agent(s), effective January 1, 2005 and continuing for the period through April 30, 2005 or until successor rates and terms are established, whichever is earlier, an interim royalty pursuant to the same rates and terms as are provided for the License Period. Such interim royalties shall be subject to retroactive adjustment based on the final successor rates. Any overpayment shall be fully creditable to future payments, and any underpayment shall be paid within thirty days after establishment of the successor rates and terms, except as may otherwise be provided in the successor terms. If there is a period of such interim payments, Licensees shall elect the particular royalty rate categories it chooses for the interim period as described in § 262.3(b), except that the election for a service that is in operation shall be made by no later than January 15, 2005.

(f) **Other royalty rates and terms.** This Part 262 does not apply to persons or entities other than Licensees, or to Licensees to the extent that they make other types of transmissions beyond those set forth in § 262.3(a). For transmissions other than those governed by § 262.3(a) hereof, or the use of Ephemeral Recordings to facilitate such transmissions, persons making such transmissions must pay royalties, to the extent (if at all) applicable, under Section 112(e) and 114 or as prescribed by other law, regulation or agreement.

**§ 262.4 Terms for making payment of royalty fees and statements of account.**

(a) **Payment to Escrow Agent~~designated agent~~.** A Licensee shall make the royalty payments due under § 262.3 to the ~~Designated~~Escrow Agent. In the absence of an Escrow Agent:

(1) A Licensee shall make the royalty payments due under § 262.3 directly to the Designated Agent(s), and,

(2) The Designated Agents shall post on their websites a list of affiliated Copyright Owners and Performers from which Licensees may determine the amount of the royalty payments due each Designated Agent.

(b) **Designation of ~~agent and potential successor designated~~ agents.**

(1) Until such time as a new designation is made, SoundExchange, presently an unincorporated division of the Recording Industry Association of America, Inc. ("RIAA"), and Royalty Logic, Inc. are designated as Designated Agents to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) and 114(g)(2).~~is designated as the Designated Agent to receive statements of account and royalty payments from Licensees due under § 262.3 and to distribute such royalty payments to each Copyright Owner and Performer entitled to~~

~~receive royalties under 17 U.S.C. 112(e) or 114(g).~~ SoundExchange shall continue to be designated after its separate incorporation and Royalty Logic, Inc. shall continue to be designated should it elect to become a not for profit corporation.~~.~~

(2) SoundExchange is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer entitled to receive royalties under 17 U.S.C. 114(g)(2), except when a Copyright Owner or Performer has notified SoundExchange in writing of an election to receive royalties from Royalty Logic, Inc. With respect to any royalty payment received by the Escrow Agent from a Licensee, a designation by a Copyright Owner or Performer of a particular Designated Agent must be made no later than thirty days prior to the allocation of receipts for any period by the Escrow Agent. In the event of a dissolution of SoundExchange, Royalty Logic, Inc. is the Designated Agent to distribute royalty payments to each Copyright Owner and Performer.

~~(2) If SoundExchange should fail to incorporate by July 1, 2003, dissolve or cease to be governed by a board consisting of equal numbers of representatives of Copyright Owners and Performers, then it shall be replaced by successor entities upon the fulfillment of the requirements set forth in (A) and (B) below.~~

~~(A) By a majority vote of the nine copyright owner representatives on the SoundExchange Board as of the last day preceding the condition precedent in § 262.4(b)(2) above, such representatives shall file a petition with the Copyright Office designating a successor Designated Agent to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Designated Agent.~~

~~(B) By a majority vote of the nine performer representatives on the SoundExchange Board as of the last day preceding the condition precedent in 262.4(b)(2), such representatives shall file a petition with the Copyright Office designating a successor Designated Agent to distribute royalty payments to Copyright Owners and Performers entitled to receive royalties under 17 U.S.C. 112(e) or 114(g) that have themselves authorized such Designated Agent.~~

~~(C) The Copyright Office shall publish in the Federal Register within thirty days of receipt of a petition filed under § 262.4(b)(2)(A) or (B) an order designating the Designated Agents named in such petitions. Nothing contained herein shall prohibit the petitions filed under § 262.4(b)(2)(A) and (B) from naming the same successor Designated Agent.~~

~~(3) If petitions are filed under § 262.4(b)(2)(A) and (B), then, following the actions of the Copyright Office in accordance with § 262.4(b)(2)(C):~~

~~(A) Each of the successor entities shall have all the rights and responsibilities of a Designated Agent under this Part 262, except as specifically set forth in this § 262.4(b)(3).~~

(3) ~~(B)~~ Licensees shall make their royalty payments to the ~~successor entity named by the copyright owner representatives under § 262.4(b)(2)(A) (the "Receiving Agent")~~Escrow Agent and shall provide statements of account on a form prepared by mutual agreement of the ~~the Receiving~~Designated Agent(s). Licensees shall submit a copy of each statement of account to the Designated Agents~~collective named by the performer representatives under § 262.4(b)(2)(B)~~ at the same time such statement of account is delivered to the ~~Receiving~~Escrow Agent.

(4) ~~(C) The Designated Agents shall agree between themselves concerning responsibility for distributing royalty payments to Copyright Owners and Performers that have not themselves authorized either Designated Agent.~~ The Designated Agents ~~also~~ shall agree to a corresponding methodology for allocating royalty payments between them using the information provided by the Licensee pursuant to the regulations governing records of use of performances for the period for which the royalty payment was made. Such allocation shall be made on a reasonable basis that uses a methodology that values all performances equally and is agreed upon among the Designated Agents. ~~Such methodology shall value all performances equally.~~ Within 30 days after their agreement concerning such responsibility and methodology, the Designated Agents shall inform the Register of Copyrights thereof.

(5) ~~(D)~~ With respect to any royalty payment received by the Escrow~~Receiving~~ Agent from a Licensee, a designation by a Copyright Owner or Performer of a Designated Agent must be made no later than 30 days prior to the ~~receipt~~allocation by the Escrow~~Receiving~~ Agent of that royalty payment.

(6) ~~(E) The Receiving~~The Escrow Agent shall promptly allocate the royalty payments it receives between the two Designated Agents in accordance with the agreed methodology. A final adjustment, if necessary, shall be agreed and paid or refunded, as the case may be, between the ~~Receiving~~Designated Agents ~~and the collectives named under § 262.4(b)(2)~~ for each calendar year no later than 180 days following the end of each calendar year. The Designated Agents shall agree on a reasonable basis for the sharing on a pro-rata basis of any costs associated with the allocations set forth in § 262.4(b)(4)~~(3)(C)~~.

(7) ~~(F)~~ If a Designated Agent is unable to locate a Copyright Owner or Performer that the Designated Agent otherwise would be required to pay under this § 262.4(b) within three years from the date of payment by Licensee, such Copyright Owner's or Performer's share of the payments made by Licensees may ~~first~~ be applied to the costs ~~directly~~ attributable to the administration of the royalty payments due such Copyright Owners and Performers by that Designated Agent. ~~and shall thereafter be allocated between the Designated Agents on a pro rata basis (based on distributions to entitled parties) to offset any costs permitted to be deducted by a designated agent under 17 U.S.C. 114(g)(3)~~. The foregoing shall apply notwithstanding the common law or statutes of any state.

(c) **Monthly payments.** A Licensee shall make any payments due under § 262.3(a) by the 45th day after the end of each month for that month, except that payments due under § 262.3(a) for the period from the beginning of the License Period through the last day of the month in which these rates and terms are adopted by the Librarian of Congress and published in the Federal Register shall be due 45 days after the end of such period. All monthly payments shall be rounded to the nearest cent.

(d) **Minimum payments.** A Licensee shall make any payment due under § 262.3(d) by January 31 of the applicable calendar year, except that:

(1) payment due under § 262.3(d) for 2003, and in the case of a Subscription Service any earlier year, shall be due 45 days after the last day of the month in which these rates and terms are adopted by the Librarian of Congress and published in the Federal Register; and

(2) payment for a Licensee that has not previously made eligible nonsubscription transmissions, noninteractive digital audio transmissions as part of a new subscription service or Ephemeral Recordings pursuant to licenses under 17 U.S.C. 114(f) and/or 17 U.S.C. 112(e) shall be due by the 45th day after the end of the month in which the Licensee commences to do so.

(e) **Late payments.** A Licensee shall pay a late fee of 0.75% per month, or the highest lawful rate, whichever is lower, for any payment received by the Designated Agent after the due date. Late fees shall accrue from the due date until payment is received by the Designated Agent.

(f) **Statements of account.** For any part of the period beginning on the date these rates and terms are adopted by the Librarian of Congress and published in the Federal Register and ending on December 31, 2004, during which a Licensee operates a service, by 45 days after the end of each month during the period, the Licensee shall deliver to the Designated Agent a statement of account containing the information set forth below on a form prepared, and made available to Licensees, by the Designated Agent. If a payment is owed for such month, the statement of account shall accompany the payment. A statement of account shall include only the following information:

(1) such information as is necessary to calculate the accompanying royalty payment, or if no payment is owed for the month, to calculate any portion of the minimum fee recouped during the month, including, as applicable, the Performances, Aggregate Tuning Hours (to the nearest minute) or Subscription Service Revenues for the month;

(2) The name, address, business title, telephone number, facsimile number, electronic mail address and other contact information of the individual or individuals to be contacted for information or questions concerning the content of the statement of account;

(3) The handwritten signature of:

(A) The owner of the Licensee or a duly authorized agent of the owner, if the Licensee is not a partnership or a corporation;

(B) A partner or delegee, if the Licensee is a partnership; or

(C) An officer of the corporation, if the Licensee is a corporation;

(4) The printed or typewritten name of the person signing the statement of account;

(5) The date of signature;

(6) If the Licensee is a partnership or a corporation, the title or official position held in the partnership or corporation by the person signing the statement of account;

(7) A certification of the capacity of the person signing; and

(8) A statement to the following effect:

I, the undersigned owner or agent of the Licensee, or officer or partner, if the Licensee is a corporation or partnership, have examined this statement of account and hereby state that it is true, accurate and complete to my knowledge after reasonable due diligence.

(g) **Distribution of payments.**

(1) The Designated Agents shall distribute royalty payments directly to Copyright Owners and Performers, according to 17 U.S.C. 114(g)(2); Provided that the Designated Agent shall only be responsible for making distributions to those Copyright Owners and Performers who provide the Designated Agents with such information as is necessary to identify and pay the correct recipient of such payments. The Designated Aagents shall distribute royalty payments on a basis that values all performances by a Licensee equally based upon the information provided by the Licensee pursuant to the regulations governing records of use of sound recordings by Licensees; Provided, however, Performers and Copyright Owners that authorize a particular~~the~~ Designated Agent may agree with the Designated Agent to allocate their shares of the royalty payments made by any Licensee among themselves on an alternative basis. Parties entitled to receive payments under 17 U.S.C. 114(g)(2) may agree with a~~the~~ Designated Agent upon payment protocols to be used by the Designated Agent that provide for alternative arrangements for the payment of royalties consistent with the percentages in 114(g)(2). In the event that a Performer does not designate an agent for collection of royalties, the Performers share of royalties shall be allocated to the Designated Agent of the Copyright owner which shall distribute royalties to the Performer consistent with this section.

(2) A~~The~~ Designated Agent shall inform the Register of Copyrights of:

(A) its methodology for distributing royalty payments to Copyright Owners and Performers who have not themselves authorized the Designated Agent (hereinafter "nonmembers"), and any amendments thereto, within 60 days of adoption and no later than 30 days prior to the first distribution to Copyright Owners and Performers of any royalties distributed pursuant to that methodology;

(B) any written complaint that the Designated Agent receives from a nonmember concerning the distribution of royalty payments, within 60 days of receiving such written complaint; and

(C) the final disposition by the Designated Agent of any complaint specified by § 262.4(g)(2)(B), within 60 days of such disposition.

(3) A Designated Agent may request that the Register of Copyrights provide a written opinion stating whether the Designated Agent's methodology for distributing royalty payments to nonmembers meets the requirements of this section.

(h) **Permitted deductions.** A~~The~~ Designated Agent may deduct from the payments made by Licensees under § 262.3, prior to the distribution of such payments to any person or entity entitled thereto, all incurred costs permitted to be deducted under 17 U.S.C. 114(g)(3); Provided, however, that any party entitled to receive royalty payments under 17 U.S.C. 112(e) or 114(g) may agree to permit ~~the~~a Designated Agent to make any other deductions.

(i) **Retention of records.** Books and records of a Licensee and of the Designated Agent relating to the payment, collection, and distribution of royalty payments shall be kept for a period of not less than three (3) years.

**§ 262.5 Confidential information.**

(a) **Definition.** For purposes of this part, "Confidential Information" shall include the statements of account, any information contained therein, including the amount of royalty payments, and any information pertaining to the statements of account reasonably designated as confidential by the Licensee submitting the statement.

(b) **Exclusion.** Confidential Information shall not include documents or information that at the time of delivery to the Escrow~~Receiving~~ Agent or a Designated Agent are public knowledge. A~~The~~ Designated Agent that claims the benefit of this provision shall have the burden of proving that the disclosed information was public knowledge.

(c) **Use of Confidential Information.** In no event shall a~~the~~ Designated Agent use any Confidential Information for any purpose other than royalty collection and distribution and activities directly related thereto; Provided, however, that a~~the~~ Designated Agent may disclose to Copyright Owners and Performers Confidential Information provided on statements of account under this part in aggregated form, so long as Confidential Information pertaining to any individual Licensee cannot readily be

identified, and the Designated Agent may disclose the identities of services that have obtained licenses under section 112(e) or 114 and whether or not such services are current in their obligations to pay minimum fees and submit statements of account (so long as the Designated Agent does not disclose the amounts paid by the Licensee).

(d) **Disclosure of Confidential Information.** Except as provided in § 262.5(c) and as required by law, access to Confidential Information shall be limited to:

(1) Those employees, agents, attorneys, consultants and independent contractors of the Designated Agent, subject to an appropriate confidentiality agreement, who are engaged in the collection and distribution of royalty payments hereunder and activities related thereto, who are not also employees or officers of a Copyright Owner or Performer, and who, for the purpose of performing such duties during the ordinary course of their work, require access to the records;

(2) An independent and qualified auditor, subject to an appropriate confidentiality agreement, who is authorized to act on behalf of the Designated Agent with respect to the verification of a Licensee's statement of account pursuant to § 262.6 or on behalf of a Copyright Owner or Performer with respect to the verification of royalty payments pursuant to § 262.7;

(3) The Copyright Office, in response to inquiries concerning the operation of the Designated Agent;

(4) In connection with future Copyright Arbitration Royalty Panel proceedings under 17 U.S.C. 114(f)(2) and 112(e), and under an appropriate protective order, attorneys, consultants and other authorized agents of the parties to the proceedings, Copyright Arbitration Royalty Panels, the Copyright Office or the courts; and

(5) In connection with bona fide royalty disputes or claims that are the subject of the procedures under § 262.6 or 262.7 hereof, and under an appropriate confidentiality agreement or protective order, the specific parties to such disputes or claims, their attorneys, consultants or other authorized agents, and/or arbitration panels or the courts to which disputes or claims may be submitted.

(e) **Safeguarding of Confidential Information.** A~~The~~ Designated Agent and any person identified in § 262.5(d) shall implement procedures to safeguard all Confidential Information using a reasonable standard of care, but no less than the same degree of security used to protect Confidential Information or similarly sensitive information belonging to such Designated Agent or person.

**§ 262.6 Verification of Statements of Account.**

(a) **General.** This section prescribes procedures by which a~~the~~ Designated Agent may verify the royalty payments made by a Licensee.

(b) **Frequency of verification.** A~~The~~ Designated Agent may conduct a single audit of a Licensee, upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three calendar years, but no calendar year shall be subject to audit more than once.

(c) **Notice of intent to audit.** A~~The~~ Designated Agent must file with the Copyright Office a notice of intent to audit a particular Licensee, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Licensee to be audited. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding on all parties participating in the audit.

(d) **Acquisition and retention of records.** The Licensee shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three years. The Designated Agent shall retain the report of the verification for a period of not less than three years.

(e) **Acceptable verification procedure.** An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all parties participating in the audit with respect to the information that is within the scope of the audit.

(f) **Consultation.** Before rendering a written report to the Designated Agent, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Licensee being audited in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Licensee reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) **Costs of the verification procedure.** A~~The~~ Designated Agent shall pay the cost of the verification procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Licensee shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

**§ 262.7 Verification of Royalty Payments.**

(a) **General.** This section prescribes procedures by which any Copyright Owner or Performer may verify the royalty payments made by a~~the~~ Designated Agent; Provided, however, that nothing contained in this section shall apply to situations where a Copyright Owner or a Performer and the Designated Agent have agreed as to proper verification methods.

(b) **Frequency of verification.** A Copyright Owner or a Performer may conduct a single audit of ~~a~~the Designated Agent upon reasonable notice and during reasonable business hours, during any given calendar year, for any or all of the prior three calendar years, but no calendar year shall be subject to audit more than once.

(c) **Notice of intent to audit.** A Copyright Owner or Performer must file with the Copyright Office a notice of intent to audit the Designated Agent, which shall, within 30 days of the filing of the notice, publish in the Federal Register a notice announcing such filing. The notification of intent to audit shall be served at the same time on the Designated Agent. Any such audit shall be conducted by an independent and qualified auditor identified in the notice, and shall be binding only on those ~~all~~ Copyright Owners and Performers participating in the audit.

(d) **Acquisition and retention of records.** The Designated Agent shall use commercially reasonable efforts to obtain or to provide access to any relevant books and records maintained by third parties for the purpose of the audit and retain such records for a period of not less than three years. The Copyright Owner or Performer requesting the verification procedure shall retain the report of the verification for a period of not less than three years.

(e) **Acceptable verification procedure.** An audit, including underlying paperwork, which was performed in the ordinary course of business according to generally accepted auditing standards by an independent and qualified auditor, shall serve as an acceptable verification procedure for all parties participating in the audit with respect to the information that is within the scope of the audit.

(f) **Consultation.** Before rendering a written report to a Copyright Owner or Performer, except where the auditor has a reasonable basis to suspect fraud and disclosure would, in the reasonable opinion of the auditor, prejudice the investigation of such suspected fraud, the auditor shall review the tentative written findings of the audit with the appropriate agent or employee of the Designated Agent in order to remedy any factual errors and clarify any issues relating to the audit; Provided that the appropriate agent or employee of the Designated Agent reasonably cooperates with the auditor to remedy promptly any factual errors or clarify any issues raised by the audit.

(g) **Costs of the verification procedure.** The Copyright Owner or Performer requesting the verification procedure shall pay the cost of the procedure, unless it is finally determined that there was an underpayment of 10% or more, in which case the Designated Agent shall, in addition to paying the amount of any underpayment, bear the reasonable costs of the verification procedure.

**§ 262.8 Unclaimed funds.**

If a Designated Agent is unable to identify or locate a Copyright Owner or Performer who is entitled to receive a royalty payment under this part, the Designated Agent shall retain the required payment in a segregated trust account for a period of three years from

the date of payment. No claim to such payment shall be valid after the expiration of the three year period. After the expiration of this period, the Designated Agent may apply the unclaimed funds to offset any costs deductible under 17 U.S.C. 114(g)(3). The foregoing shall apply notwithstanding the common law or statutes of any state.